

# A comparative examination of methods of legal recognition of non-binary gender and intersex identity

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## Introduction

Gender is often seen as one of the fundamental characteristics of a person in many cultures. Concepts of gender permeate many aspects of everyday life, including the marketing of

products, the name a person may have<sup>1</sup>, whom a person may marry and what services they may access. However despite being so fundamental to people's lives the dominant conceptions of gender in a culture can be challenged by the lived experiences of a variety of individuals, particularly transgender people.

The term gender in this thesis will be used to refer to the social and psychological aspects of a person's identity, including how a person perceives themselves and expresses their gender identity<sup>2</sup>. Gender can be contrasted with sex, which refers to solely the person's physical status, which is assigned at birth based on a person's observed phenotype<sup>3</sup>, as well as a number of other factors<sup>4</sup>. The relationship between sex and gender can be complex. While sex assigned at birth and gender identity appear to correspond with each other in approximately 99.25% of the population<sup>5</sup> they are best regarded as separate phenomena, which, while they may relate to each other and interact in complex ways, need not necessarily correspond to each other. The existence of transgender people, who have a different gender identity from that assigned based on their sex assigned at birth, demonstrate how sex assigned at birth and gender identity do not always match. This can also be demonstrated by observing that, while the physical characteristics of sex have remained fairly consistent through human history, mental and social aspects of identity which have been perceived as linked to sex have varied dramatically over time in various cultures<sup>6</sup>. This lends itself to the conclusion that gender and sex can be usefully understood as separate concepts, although they can often have complex interactions with one another, as one's body often impacts how one perceives themselves and is perceived by others<sup>7</sup>. A full discussion about the nature of sex and gender is beyond the scope of this thesis, due to the complex nature of the topic and our continually

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<sup>1</sup> As was the case in Iceland under the Personal Names Act 1996 until the passage of the Gender Autonomy Act 2019

<sup>2</sup> World Health Organization, Regional Office for Europe, Health topics, Gender, Gender: definitions, Located at <https://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions>, accessed 05/08/2021

<sup>3</sup> Intersex and gender assignment; the third way?, S F Ahmed, S Morrison, I A Hughes, Archives of Disease in Childhood 2004;89:847-850.

<sup>4</sup> Sex Assignment in Conditions Affecting Sex Development, Markosyan R, Ahmed SF, J Clin Res Pediatr Endocrinol. 2017;9(Suppl 2):106-112.

<sup>5</sup> Calculated based on estimates of the size of the population of the UK at 66.65 million and estimates of the transgender population of the UK being approximately 500000 as reported in Government Equalities Office, Trans people in the UK factsheet, Located at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721642/GEO-LGBT-factsheet.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721642/GEO-LGBT-factsheet.pdf), accessed 05/08/2021

<sup>6</sup> A map of gender-diverse cultures, PBS Independent lens, August 2015, Located at [https://www.pbs.org/independentlens/content/two-spirits\\_map-html/](https://www.pbs.org/independentlens/content/two-spirits_map-html/), accessed 11/01/2021

<sup>7</sup> Clinical intervention and embodied subjectivity: atypically sexed Children and their Parents, Katrina Roen, published as a part of Critical Intersex, Edited by Morgan Holmes, Ashgate publishing, 2009, page 22 paragraph 2

evolving understanding. For the purposes of this thesis it is hoped that it is sufficient to state that when the term sex is used in this thesis it refers to one's physical characteristics, whereas gender is used it refers to one's gender identity, which is constructed in reference to both one's individual characteristics and the interactions of society with those characteristics<sup>8</sup>.

Transgender people are those whose gender identity does not match the sex they are assigned at birth<sup>9</sup>. Similarly cisgender refers to those who do identify with the gender identity they are assigned at birth<sup>10</sup>. It should be noted that because issues of personal identity can be hugely complex these definitions are not used by everyone, and there are those who would be defined as transgender or cisgender under these definitions who would not identify as such. These definitions should not be used to challenge or deny any person's identity, but are used in this context to identify groups of persons with shared characteristics relevant to the discussion of gender identity and recognition in the law.

Transgender people have had a variety of different relationships with the law relating to gender over the course of history. The identity of transgender itself is relatively new originating in the 1960's<sup>11</sup>. However despite the word itself being relatively new, there is evidence that being transgender is very much not a new phenomenon and has been regarded in a variety of different ways by diverse cultures and legal systems. One of the legal interactions of transgender people with the law relating to gender is that of legal gender recognition. Arguably, gender recognition occurs any time a person is recognised as any gender for any purpose. For example being addressed with a gendered title such as sir or miss can be regarded as an instance of gender recognition. However the term is often used to refer to specific instances of gender recognition, in particular cases of legal gender recognition. This refers to cases where the gender a person is recognised is determined by law or has some impact which is governed by the law or has some impact on a legal relationship. The specifics of how gender recognition works in different jurisdictions and in different situations will be discussed in more detail when it becomes relevant, however at this stage it is sufficient to note that gender recognition occurs in a variety of situations for a variety of reasons. This thesis, however cannot address, in an appropriate amount of detail, every act of gender recognition, nor even every act of legal gender recognition. This thesis focuses

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<sup>8</sup> For a discussion of one possible model of gender and sex see Excluded : Making Feminist and Queer Movements More Inclusive, Serano, Julia. Seal Press, 2013, pages 138-168

<sup>9</sup> Glossary of terms, Stonewall, Located at <https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms>, accessed 11/01/2021

<sup>10</sup> Ibid

<sup>11</sup> The Psychobiology of Transsexualism and Transgenderism, Bevan, Thomas E. (2014). page 42.

primarily on gender recognition in official documents, in particular birth certificates and passports. These documents are the focus of this thesis primarily due to their use in a broader variety of situations, as one's gender / sex recorded on a passport or birth certificate is more commonly seen as / used as one's authoritative legal gender<sup>12</sup>. In addition to legal documents this this is will also examine legal gender recognition in practice in a number of situations, in particular relating to prisons and marriage. These areas of examination were selected as they are areas where gender and sex are regarded as having high importance, have been the topic of judicial discussion on a number of occasions, and because the male / female estates of prisons and the institution of marriage in the jurisdictions examined have historically only gendered to two genders / sexes. Because both of these institutions have historically placed great importance on binary sex and gender it was decided that examining how these institutions accommodate, or fail to accommodate, intersex people and those with non-binary genders would be worth particular examination. It is, however worth noting that there are other, complex gender recognition situations which will not be addressed in this thesis, in particular in cases related to sport. The importance of anti-discrimination legislation will be addressed towards the end of this thesis, however the determination of gender / sex for the purpose of discrimination legislation is not examined in detail.

For various reasons an increasing number of jurisdictions have adopted legislation for the purposes of regulating the progress of gender recognition, which govern what criteria a person must meet for their gender to be recognised in certain situations. Because these pieces of legislation govern who may be recognised as their gender identity if it differs from their sex assigned at birth, these pieces of legislation also represent an attempt by the law to define gender categories by defining how rigid or permeable the boundaries between them can be.

In addition to the inherent complexities of defining gender identities and navigating social conceptions relating to gender and sex gender recognition legislation is also faced with the reality that the diversity of gender identities that exist is not always accounted for in the law. Gender recognition systems are mostly designed with a single function in mind; to allow those who wish to "change sex" to be legally recognised as the "opposite sex"<sup>13</sup>. In practice

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<sup>12</sup> Transgender Equality, Women and Equalities Committee, First Report of Session 2015-16, HC 390, Printed 8 December 2015, House of Commons, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, at 143

<sup>13</sup> This is evident in the many systems which only account for two genders, such as marriage.

because most legal systems recognise only two genders (male and female)<sup>14</sup> their gender recognition systems only permit transition between the two binary genders. This can pose problems for those with gender identities which fall outside the male / female binary.

Gender identities which are outside the male/female binary are referred to as non-binary<sup>15</sup>. Because this category is defined as including every identity other than binary identities it is inherently broad and includes a diverse range of identities with a variety of social and personal meanings. Again, it is worth noting that the definition of non-binary used here is not subscribed to by many who would otherwise fit into the non-binary category. Particularly noteworthy is the fact that some object to the use of the term non-binary to describe them, as they view the construct as having a western origin and as having colonial overtones in that it attempts to categorize identities with non-western origins through a western paradigm<sup>16</sup>. Examples of non-binary identities include those who identify as gender fluid, gender neutral, gender queer, twospirit, hijra, fa'afafine and androgynous<sup>17</sup>. As with transgender people those with non-binary identities appear to have existed in a variety of cultures throughout history and throughout the globe today. However despite their existence throughout history non-binary identities are rarely catered to by legal systems. There are a number of possible causes of this, among which colonialism is a significant factor<sup>18</sup>. This is particularly worth keeping in mind when reading this thesis, as all of the jurisdictions chosen for discussion are heavily influenced by the British legal system due to colonialism.

Legal systems which only recognise binary genders tend to consider only these options when making policy, as they are the only available options, either for legal reasons or because the concept of non-binary identities is not present in the minds of policy makers due to the culture they live in. This results policy decision being made regarding gender which only accommodate binary genders. For example marriage in these jurisdictions may be restricted to only one man and one woman, with no contemplation of the possible existence of a person who would belong in neither category. Under certain circumstances the negative impacts of

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<sup>14</sup> For example that present in the UK, discussed at page 123

<sup>15</sup> Glossary of terms, Stonewall, Located at <https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms>, accessed 11/01/2021

<sup>16</sup> Examples are given at Non-Binary Gender Registration Models in Europe, Report on third gender marker or no gender marker options, Holzer, Lena (2018), ILGA-Europe, located at [https://www.ilga-europe.org/sites/default/files/non-binary\\_gender\\_registration\\_models\\_in\\_europe\\_0.pdf](https://www.ilga-europe.org/sites/default/files/non-binary_gender_registration_models_in_europe_0.pdf), accessed 14/06/2020 page 32

<sup>17</sup> A community compiled list of non-binary identities can be found at List of non-binary identities, Non-binary wiki, Located at [https://non-binary.miraheze.org/wiki/List\\_of\\_non-binary\\_identities](https://non-binary.miraheze.org/wiki/List_of_non-binary_identities), accessed 12/01/2021

<sup>18</sup> Transgender warriors, Leslie Feinberg, Beacon press 1996



this can be reduced, as those with non-binary gender identities are usually denied gender recognition under this system, and assigned to one of the two binary categories. This avoids those with non-binary genders being left in a lacuna outside of the available categories.

Recently a number of jurisdictions which previously recognised only binary gender categories have begun recognising non-binary options. There have been an array of reasons for this including recognitions that gender recognition should be seen as a right which should be afforded to all, including those with non-binary identities<sup>19</sup>. There have also been a number of recent court cases in which those with non-binary identities have argued they are entitled to recognition which have prompted jurisdictions to implement non-binary gender recognition<sup>20</sup>. Jurisdictions have also been motivated to recognise identities outside the binary in order to recognise the existence of intersex people<sup>21</sup>, although the intersex community do not always regard these measures as appropriate<sup>22</sup>.

Despite the positive effects that expanding the scope of gender recognition can have, recognising non-binary identities can result in a number of complications. This comes as a result of implementing the recognition of these identities in a legal system includes many elements which were not designed with them in mind. This can include marriage being regarded as between a man and a woman, as well as other situations where gender or sex are regarded as having high importance such as the provision of gendered facilities such as bathrooms as well as prisons where men and women are housed in separate estates. These complications create a need for research on the implementation of non-binary gender identities and how legal systems adapt to accommodate them.

Consideration of the legal recognition of gender identities beyond the binary is interlinked with the legal status of intersex people in a number of ways. Intersex people are those with physical characteristics which can result in difficulties in assigning them to one of the two

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<sup>19</sup> The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, International Commission of Jurists (ICJ), 10 November 2017, page 9

<sup>20</sup> For one example see *National Legal Services Authority v Union of India and others*, writ petition (civil) NO. 400 of 2012

<sup>21</sup> For an example see *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11

<sup>22</sup> The “Normalization” of Intersex Bodies and “Othering” of Intersex Identities in Australia, Carpenter, M. *Bioethical Inquiry* 15, 487–495 (2018).

binary sexes<sup>23</sup>. There are a number of conditions, sometimes referred to as Disorders of Sexual Development (DSD's) which can cause a person to be intersex<sup>24</sup>. These conditions are diverse and include physical differences to the structure of the genitals, genetic conditions, differences in hormone production and metabolism and differences in the structure and functioning of gonads<sup>25</sup>. Intersex conditions have been approached in a variety of ways by the law and various cultures over the years, including recognition as a separate sex, regarding intersex conditions as evidence of sin on the part of one's parents and recognition as a medical disorder<sup>26</sup>. The difficulty in assigning an intersex person to the male or female sexes has itself also been approached in a number of ways in those jurisdictions where such assignation has been necessary. The details of some of the approaches taken will be addressed when discussing historical approaches to sex and gender recognition, however it is worth noting that the courts have from time to time faced difficulty in determining the legal sex of intersex people<sup>27</sup>. The most common approach taken in the present day is to assign a sex based on the views of an interdisciplinary team of specialists as to what would be best for the child<sup>28</sup>. Intersex people and their legal status are relevant when discussing non-binary genders for a number of reasons. Many jurisdictions do not recognise a difference between gender and sex. Because of this the status of intersex people as those who cannot be easily placed in binary categories may lend insight as to possible future methods of recognition for those with non-binary genders. For example the case of *In the marriage of C*<sup>29</sup>, which will be discussed in more detail later, demonstrates the difficulties that being "in-between" categories can pose when rights are allocated base on belonging to binary sexes, which may be analogous to the problems non-binary people may face being outside binary genders.

Intersex people face their own unique issues separate from non-binary people. Of particular concern is the issue of surgeries performed on intersex infants which serve no medical purpose other than to ensure they conform to the physical norms of the sex to which they are

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<sup>23</sup> Glossary of terms, Stonewall, Located at <https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms>, accessed 11/01/2021

<sup>24</sup> Differences in sex development, Health A to Z, NHS, 2019 Located at <https://www.nhs.uk/conditions/differences-in-sex-development/>, accessed 12/01/2021

<sup>25</sup> Ibid

<sup>26</sup> As will be discussed at page 18

<sup>27</sup> For example *W v W (Physical Inter-Sex)* [2001] Fam 111

<sup>28</sup> Intersex and gender assignment; the third way?, S F Ahmed, S Morrison, I A Hughes, *Archives of Disease in Childhood* 2004;89:847-850.

<sup>29</sup> *In the marriage of C and D (falsely called C)* (1979) 35 FLR 340

assigned<sup>30</sup> a practice that is often referred to as “IGM” (Intersex Genital Mutilation)<sup>31</sup>. These surgeries are conducted as medical professionals believe that they are necessary to prevent longer term harm including humiliation, ostracization and other mental health issues caused by “atypical” sex characteristics<sup>32</sup>. Historically these surgeries have been conducted without parental consent or with consent obtained under deception,<sup>33</sup> with an element of “spin” used in obtaining consent in a number of modern cases<sup>34</sup>. It has been suggested that a fundamental motivation for these procedures is the social and legal need to assign children to a binary sex, and that if the legal need to record a binary sex at birth were removed by the introduction of an intersex classification this would at least lessen the pressure to assign a sex which is hypothesised to lead to these surgeries<sup>35</sup>. A number of jurisdictions have introduced intersex categories which can be assigned at birth<sup>36</sup>, however it is more common for jurisdictions to simply allow more time for a decision on a binary sex to be made<sup>37</sup>. Because of this the issue of intersex identity is interconnected with the issue of gender recognition, despite the situations of transgender and intersex people being different in a number of significant ways. It is worth noting that many in the intersex community do not seek recognition as a third sex, It has been argued that assigning intersex status at birth will lead to othering of intersex children, and that there is no evidence that allowing for intersex options at birth reduces the rate of surgeries on intersex infants<sup>38</sup>. The consensus, so far as one exists, in the intersex community appears to favour the removal of sex and gender from identity documents, but, if it must remain present on such documents intersex children should be assigned a binary sex, rather than a third option and have an option to have one’s gender / sex recognised according to the identity of the individual later in life<sup>39</sup>.

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<sup>30</sup> The human rights of intersex people: addressing harmful practices and rhetoric of change, Morgan Carpenter (2016) , Reproductive Health Matters, 24:47, 74-84,

<sup>31</sup> Intersex Genital Mutilation – A Western Version of fgm, Melinda Jones, The International Journal of Children’s Rights 25(2):396-411

<sup>32</sup> "Ambiguous Sex" - Or Ambivalent Medicine? Ethical Issues in the Treatment of Intersexuality, Alice Domurat Dreger, 28 Hastings Centre Report 24 (1998)

<sup>33</sup> Intersexuality and the Law : Why Sex Matters, Julie Greenberg, 2012, page 110 paragraph 3

<sup>34</sup> Exceptions to the Rule: Curing the Law 's Failure to Protect Intersex Infants, Anne Tamar-Mattis, Berkeley Journal of Gender, Law & Justice Volume 21 | Issue 1, September 2013, Page 65

<sup>35</sup> Born intersex in Russia: The right to be recognized, Kondratenko, T. Prospekt Magazine, December 21 2016, Located at <http://www.prospektmag.com/2016/12/intersex/>, accessed 12/01/2021

<sup>36</sup> Such as New Zealand, see page 24

<sup>37</sup> See page 169

<sup>38</sup> The “Normalization” of Intersex Bodies and “Othering” of Intersex Identities in Australia, Carpenter, M. Bioethical Inquiry 15, 487–495 (2018).

<sup>39</sup> The Darlington Statement, 10/3/2017, Located at <https://darlington.org.au/statement/>, accessed 14/12/2020, paragraph 8

This research:

This thesis originated as an attempt to examine and compare the methods used to grant legal gender recognition to those with non-binary gender identities, with a particular focus on how aspects of the law which have historically only recognised two genders have adapted or fail to adapt to the existence of new gender categories. However as the research on this project progressed it became increasingly apparent that despite being different in many ways the issues of legal recognition of non-binary identities and the legal treatment of intersex people are heavily interlinked. For example the *Norrie* case in Australia, which represented a starting point in that nations recognition of gender identities other than male and female was initiated by a person wishing to be identified as intersex on their official documentation<sup>40</sup>. The desire to allow for legal recognition as neither male nor female has been cited as a possible strategy for preventing unnecessary surgeries on intersex infants, and has been given as a reason for expanding legal recognition in a number of jurisdictions<sup>41</sup>.

There is a long history of legal entanglement of the recognition of transgender and intersex people, for example in *Corbett v Corbett* one of the expert witnesses commented that transgender people could be regarded as a sub category of intersex people, where the variation was in the brain rather than the sexual characteristics<sup>42</sup>. It is apparent that while there are profound differences between the situations of intersex people and those with non-binary gender identities, although the groups do sometimes overlap, similar issues relating to legal recognition impact both groups, who can suffer harm due to their identities or bodies being legally unintelligible.

As such this thesis examines approaches to intersex legal recognition as well as non-binary gender recognition, as many jurisdictions conflate sex and gender in their law, and others have expanded their legal recognition systems in order to accommodate intersex people, making it difficult to fully separate an analysis of the recognition of gender and sex.

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<sup>40</sup> NSW Registrar of Births, Deaths and Marriages v Norrie [2014] HCA 11

<sup>41</sup> Born intersex in Russia: The right to be recognized, Kondratenko, T. Prospekt Magazine, December 21 2016, Located at <http://www.prospektmag.com/2016/12/intersex/>, accessed 12/01/2021

<sup>42</sup> Corbett v Corbett (otherwise Ashley) (No.1)[1970] 2 W.L.R. 1306, page 99, paragraph 2

The thesis is a comparative examination of legal gender recognition measures in Australia, New Zealand, India and the UK. These jurisdictions were chosen as, when the project began in 2016, the first three were among the first jurisdictions to implement the recognition of legal categories other than male and female, with the intent of the project to be to compare the implementation of this in each jurisdiction to identify strengths and weaknesses which could contribute to a future model of best practice. Each of these countries represented different context for the legal recognition of non-binary genders or of intersex people. New Zealand had been recognising intersex legal status on birth certificates since 1995 due to legislation<sup>43</sup>, whereas recognition of non-binary identities in Australia appeared to progress as a result of the *Norrie* case. India had similarly recently produced a court decision regarding gender recognition that appeared to require the recognition of non-binary genders<sup>44</sup>. While India was somewhat similar to Australia, in so much as both appeared to be making progress regarding gender recognition due to court decisions, it appeared to be a valuable inclusion in this research as its own right, due to the unique cultural history of non-binary genders in India, which could render its implementation of gender recognition distinct from that taken in other jurisdictions. Other jurisdictions, in particular France and Germany, were also considered for inclusion in this research. However the decision was eventually made to focus on the other four jurisdictions instead. This decision was made for a number of reasons, in particular the fact that, as the project progressed, the scope of what would be required became more apparent, which made the inclusion of these jurisdictions less viable due to workload and scope considerations. The fact that legal resources from these countries were not likely to be readily available in English, and that sufficient resources for translation were not available also made their inclusion more difficult. Additionally, the fact that neither France nor Germany are common law jurisdictions and have their own distinct legal systems and traditions would have made the research and analysis necessary to incorporate them into the project much more complex. As research progressed it became apparent that the UK should be included amongst the jurisdictions examined. This is because all three of the nations originally selected are former UK colonies, and as such inherited a significant amount of its original law on gender recognition. This made the jurisdictions more directly comparable, as they share a common ancestor. As such a more detailed examination of the UK law appeared

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<sup>43</sup> Births, Deaths, Marriages, and Relationships Registration Act 1995, Public Act 1995 No.16

<sup>44</sup> National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012

to be called for. Additionally the law in the UK on gender recognition has developed in its own distinct direction from the other three jurisdictions, thus providing another point of comparison regarding how the issue of legal gender recognition can be addressed. The UK also provides a particularly interesting point of comparison as it is the sole jurisdiction in the sample not to recognise any non-binary gender or sex category. In 2015 the UK Women and Equalities Committee released a report on the legal status of transgender people, which recommended a number of changes to the law relating to gender recognition, including a recommendation that the possibility of recognising intersex legal status be investigated and considered<sup>45</sup>. This further suggested that the UK should be included as a jurisdiction to be examined in this thesis as it is a jurisdiction that may be developing towards legal recognition of non-binary gender / sex identities, and thus may be an example of a jurisdiction either at a different “phase of evolution” towards non-binary gender recognition, or one following a totally different pathway. The position of the UK as a jurisdiction that provided both the foundation of the law in the other jurisdictions, and as one in which the conditions and notions regarding non-binary gender recognition are still developing makes it interesting and worthwhile to include.

This thesis was not designed with any particular argument or conclusion in mind. The approach taken was to examine the jurisdictions in question and attempt to discern what each jurisdiction did to address the issue of gender and sex recognition, how these solutions functioned, and whether an solution or set of solutions appear to produce better outcomes than others. As “better” can be a fairly ambiguous term, it is best to explain that in this context outcomes were considered to be “better” if they respected the wishes of the local transgender and intersex communities, produced accessible and consistent results and were in keeping with the understanding of gender as a human right.

The approach taken in this thesis, that of identifying a “problem”, in this case “how should the gender identities of those with non-binary genders, be addressed, as well as the identities of intersex people?”, and examining how differing jurisdictions address the problem can be seen as a form of functional comparative legal approach<sup>46</sup>. It is hoped that by examining how different jurisdictions seek to answer the same questions that their approaches can be compared, allowing the identification of situations in which one approach may avoid

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<sup>45</sup> House of commons Women and Equalities Committee, Transgender equality, first report of the session 2015-2016 HC 390 Published on 14 January 2016, Located at

<https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, accessed 07/01/2021

<sup>46</sup> An introduction to comparative law theory and method. Samuel, G., Hart Publishing, (2017), page 65

particular problems encountered by another jurisdiction. It is worth noting that the jurisdictions selected for examination in this thesis, while they share certain aspects of their legal frameworks also differ in a number of significant ways, including differing cultural norms, which include differing understandings of gender. This necessarily has an impact on the approach taken in each jurisdiction to gender recognition, meaning that any attempt to compare the approaches taken to legal gender recognition should take this into account<sup>47</sup>.

This thesis, although it takes a functional approach, does not take the approach of a case study, of comparing the solutions taken in similar cases in different jurisdictions<sup>48</sup>. While there is a component of case examination, this thesis seeks to examine the broader impacts of non-binary gender identities and intersex status on those elements of a legal system where they are relevant. As such this thesis, as was pointed out during viva, takes an approach in some ways akin to a thematic analysis. It does so by treating each legal system of gender recognition as a “text” which can be compared to others<sup>49</sup> in order to extract common themes or differences in their approaches to legal gender recognition. This has enabled the identification of both strong and problematic practices in the jurisdictions examined, as well as themes which have appeared to emerge which exist in the jurisdictions in question, which have been synthesised to result in the creation of the recommendations in the final chapter which may assist those contemplating models of best practice in relation to the gender / sex recognition of intersex people and those with non-binary gender identities. Due to the legal similarities of the jurisdictions examined it should be noted that while some recommendations may be more broadly applicable, their application in legal systems outside of those discussed in this thesis has not been examined.

This thesis does not attempt to explain in any detail the existence of transgender or intersex people. Other publications are far better suited to this task. While it is recognised that the issue of whether transgender identities should be recognised at all, this issue has been addressed in other works far more proficiently and in more detail than could be done here. This thesis approaches the issue of gender recognition as one of human rights and thus is

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<sup>47</sup> Introduction to comparative law, (3rd rev. ed.). Zweigert, K., & Kötz, H., Clarendon Press, (1998), page 35

<sup>48</sup> An introduction to comparative law theory and method. Samuel, G., Hart Publishing, (2017), page 71

<sup>49</sup> Similar to the thematic analysis method described in Victoria Clarke & Virginia Braun (2017) Thematic analysis, *The Journal of Positive Psychology*, 12:3, 297-298

written from the perspective that gender recognition should be made available to all people, whether trans or cisgender, to the extent that is possible or meaningful within the law.

## Historical Background

Discussing the history of intersex and transgender people is made somewhat complicated by the fact that the concepts of sex and gender have been understood in a number of different ways in various times and places. As such it is difficult to say “(historical figure x) was non-binary” when they did not identify as such. In a number of cultures, particularly in western Europe, the concepts of gender and sex have historically been largely combined and conflated with each other, so the concept of being a person with anatomy that suggests one sex, but an identity that does not match that corresponding to the social roles assigned to that society was not widely contemplated, thus making identifying as such largely impossible. Even in cases where a person assuming a gendered role unrelated to their sex are well documented, such as in the case of sworn virgins<sup>50</sup>, these individuals would not necessarily identify in transgender the way many transgender people do, due to the modern western concept of being transgender is heavily related to dysphoria (which need not be present but often is) and transition, be it medical or social or both<sup>51</sup>.

Recognition of gender identities that we would consider non-binary have existed throughout time in a number of cultures, including in India, North America, Indonesia and Samoa, which have recognised more than two gender categories<sup>52</sup>. However discussing these identities in the context of legal gender recognition is somewhat difficult, as many of them were either never legally recognised, or were recognised within an oral tradition. The legal systems which have recognised these identities are often very different from the common law systems used in the jurisdictions examined in the present day, largely due to the impact of colonialism. It is also worth being aware that the term “non-binary” itself is often regarded as contributing to cultural imperialism, as it erases specific identities originating in different cultural contexts by substituting the specific terms for those identities with that for the

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<sup>50</sup> The linguistic expression of gender identity: Albania’s “sworn virgins”, Carly Dickerson, *International Journal of the Sociology of Language*, Volume 2019, Issue 256, Pages 57–83

<sup>51</sup> A Case for the Demedicalization of Queer Bodies, Erik Eckhart, *Yale J Biol Med*. 2016 Jun; 89(2): 239–246.

<sup>52</sup> A map of gender-diverse cultures, PBS Independent lens, August 2015, Located at [https://www.pbs.org/independentlens/content/two-spirits\\_map-html/](https://www.pbs.org/independentlens/content/two-spirits_map-html/), accessed 11/01/2021



umbrella term which is understood within the modern western heavily medicalised understanding of sex and gender<sup>53</sup>. As such the discussion of the history of the treatment of transgender people in the chapters that follow will be restricted to legal treatment within the modern legal systems of the respective jurisdictions, except for when it is relevant. This should not be interpreted as a claim that there was no history of legal recognition of these groups before this. Instead this is because the difficulty of that additional research would have extended the length of this project beyond viability.

It is somewhat easier to discuss intersex individuals in history, as individuals with “ambiguous” sexual characteristics have been well documented and have been subject to a number of court cases and discussion among scholars for as long as the concept of a scholar has existed.

As such the early history of intersex legal and medical treatment will be discussed here, as it is much better documented than the early history of transgender people, and includes cases from jurisdictions which are not the focus of any of the chapters to follow, as these cases are illustrative of the various issues and modes of thinking associated with the legal recognition of intersex people.

Intersex people have been understood to exist throughout human history, with their existence being the focus of a number of folk tales or myths. For example the story of Hermaphroditus in Ovid’s *Metamorphosis* describes Hermaphroditus as the original hermaphrodite, who’s body exhibited both male and female traits after being merged with the body of the nymph Salmacis after she pled to the gods to be merged with Hermaphroditus as he was fending off her forcible amorous advancements. Hermaphroditus then cursed the pool he had been bathing in at the time, that it would render all who bathed in it “weakened” as he had been<sup>54</sup>. This story contains a number of misapprehensions about what it means to be intersex, as well as misogynist overtones, and in that respect resembles a great deal of thinking on the nature of intersex people. For example the story imagines intersex people as a literal “merging” of man and woman, an idea which resembles later statements on intersex people as having a “blending” of male and female characteristics, in which one or the other may predominate. It also imagines intersex people as being inherently weakened by their characteristics, an idea

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<sup>53</sup> Two-Spirit Identity in a Time of Gender Fluidity, Margaret Robinson, *Journal of Homosexuality*, 2020, 67:12, 1675-1690

<sup>54</sup> *Metamorphoses* book 4, Ovid, Located at [classics.mit.edu/Ovid/metam.4.fourth.html](https://classics.mit.edu/Ovid/metam.4.fourth.html), accessed 14/01/2021

which appears to have persisted into the present day in certain regards, as evidenced by the surgical “correction” of intersex children in cases when it has not been medically necessary.

Pliny the Elder also discussed Intersex people, referring to them as hermaphrodites, a term that would be commonly used to refer to intersex people until the first uses of the word intersex in 1917<sup>55</sup>. Intersex people are described by Pliny as being once considered portents, but now as entertainments<sup>56</sup>. They are discussed in the same paragraph as stories of a woman giving birth to a snake and a centaur being born as a portent heralding the start of the Marsian war, later known as the social war<sup>57</sup>. While Pliny devotes little time to the discussion of intersex people, both visions of intersex people that he described have persisted much later into history.

In particular the notion of intersex people as portents or as having some mystical aspect to their nature persisted into the 17<sup>th</sup> century, with intersex people discussed in Aristotle’s Masterpiece<sup>58</sup> alongside children born with wings and hooves due to the sins of their mother.

A particularly notable case from this period of time is that of Thomas/Thomasine Hall in 1629<sup>59</sup>. Hall found themselves at the attention of the court for “dressing in weoman apparel” and for alleged fornication with a maid. When asked if they were a man or a woman, Hall responded that they were both<sup>60</sup>. When faced with the question of determining Halls gender their history was no help, as they were christened as Thomasina and raised during their early life as female, then served in the military as a man, then, after returning from war, returned to living as a woman becoming a seamstress before travelling to Virginia as an indentured servant. When faced with this question the court enquired about Halls physical sex, Halls anatomy is described as what would now be classified as “ambiguous genitalia” in a manner consistent with what one might expect from a number of intersex conditions, with what

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<sup>55</sup> Hermaphrodites and the Medical Invention of Sex, Alice Domurat Dreger, Cambridge, MA, USA: Harvard University Press, 1998, Page 31 paragraph 1

<sup>56</sup> Natural Histories, Pliny the Elder, Located at <http://data.perseus.org/citations/urn:cts:latinLit:phi0978.phi001.perseus-eng1:7.3>, accessed 14/01/202, book 7 chapter 3

<sup>57</sup> Ibid

<sup>58</sup> The Masterpiece and other works, "Aristotle, the Famous Philosopher", Ex-classics Project, 2010, Located at <https://www.exclassics.com/arist/arist.pdf>, accessed 28/12/2020, page 197

<sup>59</sup> From "The Scarlet Letter" to Stonewall: Reading the 1629 Thomas(ine) Hall Case, 1978–2009, WICHELENS, K. (2014) Early American Studies, 12(3), 500-523.

<sup>60</sup> Impossible Hermaphrodites: Intersex in America, 1620–1960 Elizabeth Reis September 2005 The Journal of American History 411, Located at [http://pages.uoregon.edu/healarts/studies/alternatives/Alt%20PDFs/Hermaphrodites\\_Reis.pdf](http://pages.uoregon.edu/healarts/studies/alternatives/Alt%20PDFs/Hermaphrodites_Reis.pdf), accessed 12/01/2021, page 419 paragraph 1

seems to be an enlarged clitoris, and “an piece of an hole” which may be a description of a partly fused labia<sup>61</sup>.

The court in this case reached a particularly interesting conclusion, which is worth being mindful of despite the fact that it was not followed in subsequent similar cases. The court Reached the conclusion that Hall truly was a mixture of male and female, and mandated that they dress in men's clothes, but with a head covering and apron as was expected of women<sup>62</sup>. This stance essentially consigned Hall to a third category, of which they were the sole member. By so doing not only did the court refuse to allow Hall to choose their own gender, but in consigning them to their own category, with their own dress code they essentially stripped hall of their right to conceal their status if they wished, marking Hall out as abnormal forever. This case therefore marks one of the first instances of a western legal system recognising a person as neither male nor female, and can serve as an example of how assigning a person to such a category against their will can be equally oppressive to assigning someone to a binary category contrary to their autonomy, arguably even more so.

Following this legal and medical opinion appeared to converge on a consensus regarding as to how the issue of an intersex person's sex / gender should be addressed. As James Parsons wrote in 1741:

“Predominancy of Sex . . . ought to be regarded; but if the Sexes seem equal, the Choice is left to the Hermaphrodite.”<sup>63</sup>

As such determining predominancy of sex would become the key issue around which future cases would revolve. However it appears though physicians developed a reluctance to ever find that a person had equal predominance of both sexes, which would have granted them the right to choose how they should be treated<sup>64</sup>. For example the 1863 case of M.B.H. Who, despite being described by the doctor as having a “nearly an equal blending of male and female natures” was determined to have a “preponderance of woman”. Amongst the evidence

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<sup>61</sup> Impossible Hermaphrodites: Intersex in America, 1620–1960 Elizabeth Reis September 2005 The Journal of American History 411, Located at [http://pages.uoregon.edu/healarts/studies/alternatives/Alt%20PDFs/Hermaphrodites\\_Reis.pdf](http://pages.uoregon.edu/healarts/studies/alternatives/Alt%20PDFs/Hermaphrodites_Reis.pdf), accessed 12/01/2021, page 418 paragraph 2

<sup>62</sup> Ibid

<sup>63</sup> A Mechanical and Critical Enquiry into the Nature of Hermaphrodites, James Parsons, Sagwan Press, 1741

<sup>64</sup> Impossible Hermaphrodites: Intersex in America, 1620–1960 Elizabeth Reis September 2005 The Journal of American History 411, Located at [http://pages.uoregon.edu/healarts/studies/alternatives/Alt%20PDFs/Hermaphrodites\\_Reis.pdf](http://pages.uoregon.edu/healarts/studies/alternatives/Alt%20PDFs/Hermaphrodites_Reis.pdf), accessed 12/01/2021, page 438 paragraph 2

used was the M.B.H. expressed no sexual desire towards either sex, which seems telling of the sexual stereotypes at the time and the conflation of gender and sex roles, as well as the tenuous grounds on which an individual could be denied autonomy over their own identity<sup>65</sup>.

This tendency to find a person to be one sex or another came to rely on the use of tools of categorization which became more sophisticated along side the development of science. Physicians began to characterise individuals as “true hermaphrodites” or “pseudo hermaphrodites”, with the requirements to be recognised as a true hermaphrodite becoming increasingly restrictive<sup>66</sup>. Illustrative of this is that the criteria used by a number of physicians changed from a mixture of male and female characteristics in more than one “zone” of the body<sup>67</sup> to the more restrictive requirement of requiring that the person possess ovotestis, an organ which is a mixture of ovarian and testicular tissue<sup>68</sup> as microscopy technology improved and became more widely used. This led to what has been described as the erasure of intersex people, as it became increasingly difficult for a person to be recognised as genuinely intersex. As this continued the view that “hermaphrodites” did not exist, for example John North in 1810 wrote that:

“Although we see many instances of true hermaphroditism in the animal and vegetable kingdoms, no such cases have ever existed in the human subject; no human hermaphrodite, in the proper sense of the term, has ever existed; not a single so-called hermaphrodite in man has even been capable of performing the sexual functions of both sexes.”<sup>69</sup>

This serves as an example of how the focus had shifted from determining predominance to a focus on “sexual functions” as the functioning of the reproductive system became better understood.

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<sup>65</sup> Impossible Hermaphrodites: Intersex in America, 1620–1960 Elizabeth Reis September 2005 The Journal of American History 411, Located at [http://pages.uoregon.edu/healarts/studies/alternatives/Alt%20PDFs/Hermaphrodites\\_Reis.pdf](http://pages.uoregon.edu/healarts/studies/alternatives/Alt%20PDFs/Hermaphrodites_Reis.pdf), accessed 12/01/2021, page 435, paragraph 3

<sup>66</sup> Impossible Hermaphrodites: Intersex in America, 1620–1960 Elizabeth Reis September 2005 The Journal of American History 411, Located at [http://pages.uoregon.edu/healarts/studies/alternatives/Alt%20PDFs/Hermaphrodites\\_Reis.pdf](http://pages.uoregon.edu/healarts/studies/alternatives/Alt%20PDFs/Hermaphrodites_Reis.pdf), accessed 12/01/2021, page 412, paragraph 2

<sup>67</sup> Sexing the body, Anne Fausto-sterling, basic books, 2000. 37 para 2

<sup>68</sup> Sexing the body, Anne Fausto-sterling, basic books, 2000. 38 para 1

<sup>69</sup> A lecture on monstrosities, Delivered at the Middlesex hospital School of medicine Feb 22 1810, John North, The Lancet London: A Journal of British and Foreign Medicine, Surgery, Obstetrics, Physiology, Chemistry, Pharmacology, Public Health and News, Volume 1, 913-920, Page 912

A case from this era which has been widely discussed is that of Herculine Barbin, who was classified as male based on medical examinations in 1860<sup>70</sup>. As a result of the medical examination a court found that she should be classified as male, and she lived the rest of her life as a man, despite being unhappy with this and describing the process as being “doomed to abandonment, to cold isolation”<sup>71</sup>. This acutely demonstrates the harms and injustices caused by classifying a person based on medical assessment without taking the autonomy of the individual into account, even in the absence of any surgical interference.

As technology and medical understanding progressed surgery on people with intersex characteristics became more common. The first documented surgery of this kind being conducted in 1833 by Dr John Warren<sup>72</sup>, with “corrective” surgeries on intersex people becoming more common following Dr Money’s work in the 1950’s<sup>73</sup>. Dr Warren performed his surgery at the request of the patient<sup>74</sup>, however in contrast to this Dr Money is known for the view that if a successful surgery is performed on the patient as an infant they are raised correctly, they will adapt to be a happy, typical member of the assigned sex<sup>75</sup>. Despite the high-profile case of David Reimer<sup>76</sup> this view appears to have become increasingly common, with conducting such surgeries becoming routine practice in the decades to follow<sup>77</sup>.

Surgeries conducted on infants without parental consent have been documented, as have a number of cases where “spin” is used to obtain parental consent<sup>78</sup>. A number of medical practitioners have commented that careful use of language, which may result in parents not being fully and accurately informed, is necessary in order to avoid instilling doubts as to their child’s sex in the parents, which would be harmful to the child<sup>79</sup>. A number of jurisdictions have now banned such procedures<sup>80</sup>, although these measures have also been criticised as

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<sup>70</sup> Hermaphrodites and the Medical Invention of Sex, Alice Domurat Dreger, Cambridge, MA, USA: Harvard University Press, 1998, Page 18 paragraph 3

<sup>71</sup> Herculine Barbin. Being the recently discovered memoirs of a nineteenth-century hermaphrodite, introduced by Michel Foucault, translated by Richard McDougall, Brighton, Sussex, Harvester Press, 1980, 87 paragraph 2

<sup>72</sup> Non-existence of Vagina, Remedied by an Operation, John C. Warren, American Journal of the Medical Sciences, 13 (Nov. 1833), 79–80.

<sup>73</sup> Man and woman, boy and girl: Differentiation and dimorphism of gender identity from conception to maturity, Money, J., & Ehrhardt, A. A. (1972) Johns Hopkins U. Press.

<sup>74</sup> Non-existence of Vagina, Remedied by an Operation, John C. Warren, American Journal of the Medical Sciences, 13 (Nov. 1833), 79–80.

<sup>75</sup> Managing intersex, Sarah Creighton, Catherine Minto, BMJ. 2001 Dec 1; 323(7324): 1264–1265.

<sup>76</sup> Exceptions to the Rule: Curing the Law 's Failure to Protect Intersex Infants, Anne Tamar-Mattis, Berkeley Journal of Gender, Law & Justice Volume 21 | Issue 1, September 2013, page 59

<sup>77</sup> Managing intersex, Sarah Creighton, Catherine Minto, BMJ. 2001 Dec 1; 323(7324): 1264–1265.

<sup>78</sup> Exceptions to the Rule: Curing the Law 's Failure to Protect Intersex Infants, Anne Tamar-Mattis, Berkeley Journal of Gender, Law & Justice Volume 21 | Issue 1, September 2013, Page 65

<sup>79</sup> Ibid

<sup>80</sup> For example in 2015 Malta passed the Gender Identity, Gender Expression and Sex Characteristics Act 2015

being poorly implemented and occasionally not containing sufficient sanctions<sup>81</sup>. However these surgeries are still performed in a number of jurisdictions, including the UK<sup>82</sup>.

This leads to the modern status quo in most jurisdictions, where intersex identities are not consistently recognised and the determination of the sex of intersex people is directly linked to surgical procedures which are regarded by many intersex people as genital mutilation<sup>83</sup>. Because these surgeries are performed to enable a person to better fit into the male/female sexual binary a number of intersex people have sought to have their identities recognised outside the binary, both due to their own personal identities, but also in the hope that this will remove the necessity for a person to be classified as male or female<sup>84</sup>. It is hoped that this will eliminate the need for surgeries to be conducted on intersex infants, however this is disputed due to a lack of evidence<sup>85</sup>.

Specifics about the recent legal history in each jurisdiction will be discussed in their individual chapters. There is one chapter for each of the jurisdictions examined which will detail the substantive law and relevant issues in those jurisdictions. This will then be followed by a concluding chapter, which will analyse the differences in the jurisdictions and then provide recommendations based on this examination for the use of those considering the legal issues surrounding non-binary / intersex gender recognition.

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<sup>81</sup> Intersex Genital Mutilations, NGO Report to the 3rd to 6th Report of Malta to the Convention on the Rights of the Child, Compiled by StopIGM.org, Markus Bauer, Daniela Truffer, 2019, Located at [https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MLT/INT\\_CRC\\_NGO\\_MLT\\_34709\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MLT/INT_CRC_NGO_MLT_34709_E.pdf), accessed 14/01/2021

<sup>82</sup> Intersex Genital Mutilations, NGO Report to the 8th Report of the United Kingdom on the Convention on the Elimination of All Forms of Discrimination against Women, Compiled by StopIGM.org, Markus Bauer, Daniela Truffer, 2018, Located at [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/INT\\_CEDAW\\_ICO\\_GBR\\_31475\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/INT_CEDAW_ICO_GBR_31475_E.pdf), accessed 14/01/2021

<sup>83</sup> Intersex Genital Mutilation – A Western Version of fgm, Melinda Jones, The International Journal of Children's Rights 25(2):396-411

<sup>84</sup> Born intersex in Russia: The right to be recognized, Kondratenko, T. Prospekt Magazine, December 21 2016, Located at <http://www.prospektmag.com/2016/12/intersex/>, accessed 12/01/2021

<sup>85</sup> The “Normalization” of Intersex Bodies and “Othering” of Intersex Identities in Australia, Carpenter, M. Bioethical Inquiry 15, 487–495 (2018).

## The legal situation in New Zealand.

### Introduction:

While New Zealand recognises non-binary sexes and genders it cannot be said to do so consistently. This is because while the two concepts do not seem to be treated as legally distinct<sup>86</sup>, the process of having one's gender or sex recognised is not consistent among the various different documents which recognise gender or sex, or contain it as a mandatory field<sup>87</sup>. This is the case because New Zealand, does not have a statutory definition of either sex or gender or any way of having one's gender recognised for all purposes<sup>88</sup>. This lack of a definitive definition or method of recognition has resulted in a status-quo in which different

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<sup>86</sup>As can be seen by the apparent use of the terms interchangeably in the Births, Deaths, Marriages, and Relationships Registration Act 1995

<sup>87</sup>As can be seen by the differences in requirements for the various documents as outlined later.

<sup>88</sup> Human rights commission report: to be who I am, Report of the inquiry into discrimination experienced by transgender people 2007 located at [https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008\\_14-56-48\\_HRC\\_Transgender\\_FINAL.pdf](https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf), accessed 17/12/2020 at 8.5

identity documents have different gender recognition criteria, and each document is authoritative only in its own area<sup>89</sup>.

Because of the patchwork nature of this system of gender recognition, each part must be addressed separately in turn, as the procedures for amending each of the relevant official documents which recognise gender are all equally authoritative parts of the gender recognition system. Birth certificates shall be addressed first, followed by citizenship certificates, passports and driver's licenses. Following an examination of these systems it is also necessary to see how these systems impact people in practice and interact with different areas of the law. The areas of marriage and prisons are of particular interest due to substantial role played by gender in these systems, as gender can impact who a person may marry, and can have substantial impacts if a person must spend time in prison, particularly as it determines where they may be housed.

#### Birth certificates:

Birth certificates are governed by the Births, Deaths, Marriages, and Relationships Registration Act 1995<sup>90</sup>. All births must be registered, and sex must be recorded. At birth sex may be recorded as male, female or indeterminate. Alterations to the birth certificate after birth with regards to sex are addressed primarily by section 28. Section 28 contains within it two paths to recognition, one for those who can demonstrate that their sex on their birth certificate was recorded in error, and one for those who were assigned the "correct" sex at birth and wish to have their sex on their birth certificate amended to reflect either their gender identity or current physical sex following surgery.

The first criteria, for those who can demonstrate error in the original certificate are fairly simple. Section 28 (a) states that a family court declaration may be made to amend the birth certificate if:

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<sup>89</sup>For example birth certificates are not authoritative in all areas.

<sup>90</sup>Births, Deaths, Marriages, and Relationships Registration Act 1995, Public Act 1995 No.16



“It is satisfied either that the applicant's birth is registrable under this Act but is not yet registered, or that there is included in the record of the applicant's birth—

Information that the applicant is a person of the sex opposite to the nominated sex; or

Information that the applicant is a person of indeterminate sex”<sup>91</sup>

This process allows for people to have their birth certificate corrected if there was, at time of birth, reason to suspect that they may be the sex other than recorded. This process seems to exist to correct the sex recorded in instances where there was medical uncertainty, rather than a clerical error, which is dealt with by section 84 of the act<sup>92</sup>. It is worth noting that this does not allow a person to have their sex registered as indeterminate if it was not recorded as such originally. While it is possible for a person's sex to be recorded as indeterminate at birth it is not possible to have it amended from being registered as male or female to indeterminate using section 28<sup>93</sup>. It is however possible to have one's sex amended to be indeterminate using section 84. This requires that there was evidence that this was the case at birth. As such it cannot be used if the “indeterminate state” arose after birth, as the process under section 84 is for correcting clerical errors<sup>94</sup>, and no error would have been made if there was no indeterminacy at birth. This section is interesting as it seems to treat indeterminacy as something undesirable, which may be resolved and transitioned out of, but which is not a state one may enter voluntarily or willingly later in life. In this way it can be seen as less liberal than other systems of recognition which recognise an “indeterminate” sex, as it only permits passage out of it this state. It is possible that the original drafters of this legislation saw “indeterminacy” as an unfortunate physical state, not an identity one could embrace. Because this legislation does not include any provision to recognise an intersex person if their physical state was not recorded at birth, and relies on physical characteristics, it seems that the purpose of this legislation is not to recognise an intersex person's identity. While they may choose to be recognised as male or female at a later point in time, and that may reflect

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<sup>91</sup>Births, Deaths, Marriages, and Relationships Registration Act 1995, Public Act 1995 No.16 s.28

<sup>92</sup>Births, Deaths, Marriages, and Relationships Registration Act 1995, Public Act 1995 No.16 s.84

<sup>93</sup>Department of Internal Affairs, General information regarding Declarations of Family Court as to sex to be shown on birth certificates, located at [https://www.dia.govt.nz/diawebsite.nsf/Files/GeninfoDeclarationsofFamilyCourt/\\$file/GeninfoDeclarationsofFamilyCourt.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/GeninfoDeclarationsofFamilyCourt/$file/GeninfoDeclarationsofFamilyCourt.pdf), accessed 17/12/2020 page 4 para 7 which is an explanation of section 28 (a) ii

<sup>94</sup>Department of Internal Affairs, General information regarding Declarations of Family Court as to sex to be shown on birth certificates, located at [https://www.dia.govt.nz/diawebsite.nsf/Files/GeninfoDeclarationsofFamilyCourt/\\$file/GeninfoDeclarationsofFamilyCourt.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/GeninfoDeclarationsofFamilyCourt/$file/GeninfoDeclarationsofFamilyCourt.pdf), accessed 17/12/2020, page 4 para 6

their gender identity, there seems to be no mechanism for recognising an intersex identity, as the determination is made based on physical characteristics at birth<sup>95</sup>. As such the recognition of an indeterminate state seems not to be to recognise a person's identity and make it easier for them to function within society, instead it may well exist solely to take pressure off of parents to allocate their child a gender at birth, as it, and the issue of sex, can be resolved later.

The second process is usually used for gender recognition of transgender people, the applicable subsection being (3)(b), which reads:

The Court shall issue the declaration if, and only if,—

(b) It is satisfied that the applicant is not a person of the nominated sex, but—

(i) Has assumed and intends to maintain, or has always had and intends to maintain, the gender identity of a person of the nominated sex; and

(ii) Wishes the nominated sex to appear on birth certificates issued in respect of the applicant; and

(c) Either—

(i) It is satisfied, on the basis of expert medical evidence, that the applicant—

(A) Has assumed (or has always had) the gender identity of a person of the nominated sex; and

(B) Has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the

applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex; and

(C) Will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex; or

(ii) It is satisfied that the applicant's sexual assignment or reassignment as a person of the nominated sex has been recorded or recognised in accordance with the laws of a state for the

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<sup>95</sup> "Change can never be 'complete'": the legal right to self-identification and incongruous bodies, Easterbrook-Smith, G, (2020) 1 International Journal of Gender, Sexuality and Law 134, page 145

time being recognised for the purposes of this section by the Minister by notice in the Gazette.”<sup>96</sup>

This section, inserted into the Act in 2009<sup>97</sup> allows a person to change the sex recorded on their birth certificate if they have assumed, or have always had, the gender identity “of a person of the nominated sex” and intend to maintain it<sup>98</sup>. They must also demonstrate that they have had medical treatment, which medical experts consider desirable to enable them to “acquire a physical conformation that accords with the gender identity of a person of the nominated sex”<sup>99</sup>.

The meaning of this section is somewhat uncertain, as mentioned by the recent report by the Human Rights Commission on transgender people and the law<sup>100</sup>. The source of the uncertainty stems from the meaning of:

“such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex”<sup>101</sup>

This section has been applied inconsistently. As reported by the Human Rights Commission (HRC) many transgender people believed that this wording meant that they had to undergo “complete” surgical transition, involving genital surgery as well as hormonal treatment<sup>102</sup>.

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<sup>96</sup> Births, Deaths, Marriages, and Relationships Registration Act 1995, Public Act 1995 No.16 s.28 Section 3

<sup>97</sup> Births, Deaths, Marriages, and Relationships Registration Amendment Act 2008 (2008 No 48) Section 16(3)

<sup>98</sup> Births, Deaths, Marriages, and Relationships Registration Act 1995, Public Act 1995 No.16 s.28 (3) b (i)

<sup>99</sup> Births, Deaths, Marriages, and Relationships Registration Act 1995, Public Act 1995 No.16 s.28 (3) c (i) C

<sup>100</sup> Human rights commission report: to be who I am, Report of the inquiry into discrimination experienced by transgender people 2007 located at [https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008\\_14-56-48\\_HRC\\_Transgender\\_FINAL.pdf](https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf), accessed 17/12/2020, at 8.28

<sup>101</sup> The wording of the Births, Deaths, Marriages, and Relationships Registration Act 1995, Public Act 1995 No.16 s.28 (3) c (i) C

<sup>102</sup> Human rights commission report: to be who I am, Report of the inquiry into discrimination experienced by transgender people 2007 located at [https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008\\_14-56-48\\_HRC\\_Transgender\\_FINAL.pdf](https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf), accessed 17/12/2020, at 8.28

This interpretation was the most commonly used, although the advice given to those seeking a declaration varied<sup>103</sup>. This is not only a problem of a lack of consistency, but it also fails to acknowledge the realities of transgender people's lives<sup>104</sup>. Medical science is limited and as such it is not currently possible to produce consistently positive results, positive in this case meaning a desirable and functional physical state, especially in the case of those transitioning from female to male<sup>105</sup>. Of course this could be seen as being accounted for by the requirement for medical experts to find the treatment desirable, but it is not always<sup>106</sup>, which can pose a problem for consistency. Not only do the limits of medicine often prevent people from obtaining surgery, but people often choose not to get surgery for personal reasons. This was acknowledged in the HRC report, where it was suggested that the medical treatment requirement be removed.<sup>107</sup>

This uncertainty became the basis of "*Michael' v Registrar - General of Births, Deaths and Marriages*"<sup>108</sup>. Michael had been assigned the gender of female at birth and had changed his name and begun hormonal treatment in accordance with the international standards of care<sup>109</sup>, but had not had genital surgery. This was not only because positive surgical outcomes are much more difficult to achieve for those individuals transitioning from female to male, and at the time this procedure was not available in New Zealand and the cost of having the procedure elsewhere was prohibitive<sup>110</sup>. The question at hand was to what degree surgery is

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<sup>103</sup> Human rights commission report: to be who I am, Report of the inquiry into discrimination experienced by transgender people 2007 located at [https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008\\_14-56-48\\_HRC\\_Transgender\\_FINAL.pdf](https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf), accessed 17/12/2020, at 6.21

<sup>104</sup> Human rights commission report: to be who I am, Report of the inquiry into discrimination experienced by transgender people 2007 located at [https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008\\_14-56-48\\_HRC\\_Transgender\\_FINAL.pdf](https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf), accessed 17/12/2020, at 8.23 and 6.21

<sup>105</sup> Patient reported outcome measures and quality of life assessment in genital gender confirming surgery, Geolani W. Dy, Ian T. Nolan, James Hotaling, Jeremy B. Myers, *Transl Androl Urol*. 2019 Jun; 8(3): 228–240, Located at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6626309/>, accessed 28/12/2020

<sup>106</sup> As shown by the advice people were given which failed to consider this, mentioned in Human rights commission report: to be who I am, Report of the inquiry into discrimination experienced by transgender people 2007 located at [https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008\\_14-56-48\\_HRC\\_Transgender\\_FINAL.pdf](https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf), accessed 17/12/2020, at 6.21

<sup>107</sup> Human rights commission report: to be who I am, Report of the inquiry into discrimination experienced by transgender people 2007 located at [https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008\\_14-56-48\\_HRC\\_Transgender\\_FINAL.pdf](https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf), accessed 17/12/2020, at 8.44

<sup>108</sup> "*Michael' v Registrar-General of Births, Deaths and Marriages* Family court Auckland fam-2006004 2325 9th June 2008m 28 FRNZ58

<sup>109</sup> The standards of care are internationally agreed upon protocols for the treatment of gender dysphoria published by the World Professional Association for Transgender Health located at [http://www.wpath.org/site\\_page.cfm?pk\\_association\\_webpage\\_menu=1351&pk\\_association\\_webpage=4655](http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351&pk_association_webpage=4655)

<sup>110</sup> "*Michael' v Registrar-General of Births, Deaths and Marriages* Family court aukland fam-2006004 2325 9th June 2008m 28 FRNZ58 at 15

necessary for subsection 3(c)(i)(B). In considering this question the court addressed two aspects, that of the opinions of medical experts and that of the intent of Parliament.

In addressing the intent of Parliament, the court referred to the original bill, which contained different wording for the relevant section. The original<sup>111</sup> read “all medical procedures usually regarded by medical experts as necessary”, which is significantly different from the current version, which reads “*such medical treatment* as is usually regarded by medical experts as *desirable*”. This, according to the court, represents a significant relaxation of the criteria, with the change from “all” to “such”, meaning that the medical transition need not be “complete”, particularly when coupled with the change in wording from necessary to desirable<sup>112</sup>. While these sentences could be seen as being largely similar, it may better reflect how doctors and patients see medical treatment for gender dysphoria and the medical process of gender transition. While many conditions are treated by administering the “necessary” treatment, gender dysphoria may be more complex. There is no one universal path which all transgender persons follow, with some seeking surgical procedures that others do not require, as their dysphoria is sufficiently addressed without them. As such there may be no one “necessary” treatment, merely “desirable” procedures and treatments which allow the patient to achieve a state where they are more able to live with their body and able to live within their gender to their satisfaction. The court also found that the use of the phrase “a physical conformation” rather than the use of “the physical conformation” suggests that surgery should not be seen as necessary, as the use of the word “a” suggests that Parliament acknowledged that complete conformity with the typical bodily template of the nominated sex was not necessary. It could also be seen as an acknowledgement that there is no single physical state that corresponds to a gender or sex, with multiple states still being valid.

In addition to this the court also heard from medical experts, in particular the applicant’s psychiatrist, who said that the applicant had had all necessary treatment due to a combination of psychotherapy and hormonal treatments and that this would enabled him to pass as male. Other procedures, such as a hysterectomy, would be unnecessary and undesirable as

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<sup>111</sup>The Births, Deaths and Marriages Registration Bill No 193-1, 5/11/89. cl 29.

<sup>112</sup> Case Comment: “Michael” v Registrar-General of Births, Deaths and Marriages, Professor Nan Seuffert[2009] WkoLawRw 7; (2009) 17 Waikato Law Review 115 [www.nzlii.org/cgi-bin/sinodisp/nz/journals/WkoLawRw/2009/7.html?query=Michael%20v%20Registrar-General%20of%20Births,%20Deaths%20and%20Marriages](http://www.nzlii.org/cgi-bin/sinodisp/nz/journals/WkoLawRw/2009/7.html?query=Michael%20v%20Registrar-General%20of%20Births,%20Deaths%20and%20Marriages) 118 para 1

unnecessary surgery should be avoided<sup>113</sup>. The court found that ‘the combination of the ongoing testosterone hormone therapy, and the surgery, mean that Michael will never exhibit the secondary sexual characteristics of breasts in future, and therefore will continue to physically conform in that respect to the nominated gender.’<sup>114</sup> The court used an individualised test of what should be seen as necessary, stating that “the applicant’s degree of comfort with, or physical conformity to their nominated gender identity is the proper focus of treatment decisions”<sup>115</sup>.

While this ruling has been said to have clarified the issue, resulting in the government advising that genital surgery is not necessary<sup>116</sup>, this individualized approach could mean that in some cases genital surgery could be considered necessary based on individual circumstances. So while this judgement has been hailed as eliminating the uncertainty with regards to the medical treatment criteria, it may well be that this uncertainty still exists, but has been moved from the courts to medical professionals. It may now be medical professionals, rather than the courts, determining what should be considered necessary to attain gender recognition, and this may vary dramatically based on the circumstances of the individual.

While section 28 does allow transgender and intersex people some degree of recognition, it is far from perfect. Despite *Michael’s case* large numbers of transgender people report uncertainty about the legal requirements for recognition<sup>117</sup> and the changes recommended by

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<sup>113</sup> Case Comment: "Michael" v Registrar-General of Births, Deaths and Marriages, Professor Nan Seuffert[2009] WkoLawRw 7; (2009) 17 Waikato Law Review 115 [www.nzlii.org/cgi-bin/sinodisp/nz/journals/WkoLawRw/2009/7.html?query=Michael%20v%20Registrar-General%20of%20Births,%20Deaths%20and%20Marriages](http://www.nzlii.org/cgi-bin/sinodisp/nz/journals/WkoLawRw/2009/7.html?query=Michael%20v%20Registrar-General%20of%20Births,%20Deaths%20and%20Marriages) 119 para 1

<sup>114</sup> "Michael" v Registrar-General of Births, Deaths and Marriages Family court aukland fam-2006004 2325 9th June 2008m 28 FRNZ58 at 89

<sup>115</sup> "Michael" v Registrar-General of Births, Deaths and Marriages Family court aukland fam-2006004 2325 9th June 2008m 28 FRNZ58 at 69

<sup>116</sup> Case Comment: "Michael" v Registrar-General of Births, Deaths and Marriages, Professor Nan Seuffert[2009] WkoLawRw 7; (2009) 17 Waikato Law Review 115, Located at [www.nzlii.org/cgi-bin/sinodisp/nz/journals/WkoLawRw/2009/7.html?query=Michael%20v%20Registrar-General%20of%20Births,%20Deaths%20and%20Marriages](http://www.nzlii.org/cgi-bin/sinodisp/nz/journals/WkoLawRw/2009/7.html?query=Michael%20v%20Registrar-General%20of%20Births,%20Deaths%20and%20Marriages), Accessed 15/12/2020 119 para 3

<sup>117</sup> Human rights commission report: to be who I am, Report of the inquiry into discrimination experienced by transgender people 2007 located at [https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008\\_14-56-48\\_HRC\\_Transgender\\_FINAL.pdf](https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf), accessed 17/12/2020, at 8.44

the 2007 report have not been implemented, perhaps as they are perceived to have been made redundant by the *Michael* judgement<sup>118</sup>.

This issue was particularly relevant, as starting in 2014 access to relevant surgical procedures became highly restricted in New Zealand due to the retirement of the only specialist surgeon in the country<sup>119</sup>. This resulted in an increase in prices which led the government to only fund three procedures for persons assigned female at birth and one for those assigned male at birth every two years, which resulted in an expected time on a waiting list of over 30 years<sup>120</sup>.

This, while concerning of itself, represents a dramatic scarcity of medical procedures which could have been regarded as necessary for particular patients which would render the reliance on medical procedures problematic. Fortunately there seems to have been no instance of surgery being seen as necessary since the *Michael* case, however the amount of confusion on the issue mentioned by the 2007 report<sup>121</sup> may mean that some people erroneously believed that they could not access legal gender recognition because they could not access surgery.

This issue was addressed in 2018 when the government announced that the cap on the public funding of these procedures would be eliminated and replaced with a minimum number that will be funded<sup>122</sup>.

In 2016 a bill was introduced to amend a number of aspects of the Births, Deaths, Marriages, and Relationships Registration Act, including gender recognition on birth certificates<sup>123</sup>. This bill would allow a person over the age of 16 to apply to change the sex on their birth

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<sup>118</sup>Human rights commission report: to be who I am, Report of the inquiry into discrimination experienced by transgender people 2007 located at [https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008\\_14-56-48\\_HRC\\_Transgender\\_FINAL.pdf](https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf) at 9.33

<sup>119</sup>New Zealand reduces 30-year wait for gender reassignment surgery, Eleanor Ainge Roy, 19/10/2018, Located at <https://www.theguardian.com/society/2018/oct/19/new-zealand-reduces-30-year-wait-for-gender-reassignment-surgery>, accessed 07/09/2019

<sup>120</sup>New Zealand reduces 30-year wait for gender reassignment surgery, Eleanor Ainge Roy, 19/10/2018, Located at <https://www.theguardian.com/society/2018/oct/19/new-zealand-reduces-30-year-wait-for-gender-reassignment-surgery>, accessed 07/09/2019

<sup>121</sup>*Michael v Registrar-General of Births, Deaths and Marriages* Family court aukland fam-2006004 2325 9th June 2008m 28 FRNZ58 at 69

<sup>122</sup>New Zealand reduces 30-year wait for gender reassignment surgery, Eleanor Ainge Roy, 19/10/2018, Located at <https://www.theguardian.com/society/2018/oct/19/new-zealand-reduces-30-year-wait-for-gender-reassignment-surgery>, accessed 07/09/2019

<sup>123</sup>New Zealand Parliament, Parliamentary Business, Bills and laws, Bills (proposed laws), Births, Deaths, Marriages and Relationships Registration Bill, Located at [https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL\\_74854/births-deaths-marriages-and-relationships-registration](https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_74854/births-deaths-marriages-and-relationships-registration), accessed 04/09/2019

certificate to “Male, Female, Intersex or X (unspecified)”<sup>124</sup>, with Intersex and X being options not available under the current law. Such an application would require a statutory declaration stating that the applicant is aware of the legal consequences of the application, that they identify as the nominated sex and that they intend to continue identifying as a member of that sex<sup>125</sup>. If the applicant is aged 16-17 the application would also require a recommendation from a health professional confirming that the applicant identifies as the nominated sex and that registration of this is in their best interests<sup>126</sup>. Such an application would not be successfully if such an application was granted previously unless there are special reasons for granting the new application, meaning a person could only change their registered sex once in most circumstances<sup>127</sup>. The “Special reasons” that would be required are not defined in the bill. At the time of writing this bill has made no progress since August 2018<sup>128</sup>, with news reports suggesting that the passage of the bill is no longer being actively pursued<sup>129</sup>.

Despite the lack of legislative progress despite multiple calls for reform, the law in New Zealand on this issue is far from static, with much of the change coming from various executive departments amending their procedures and requirements. While this is most notable with the other identity documents discussed in the following paragraphs, this practice has also impacted birth certificates, with the Minister for Internal Affairs announcing in August 2019 that the 95 NZD fee to change ones gender on their birth certificate would be abolished, as would the fee for having a new birth certificate issued<sup>130</sup>.

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<sup>124</sup> Births, Deaths, Marriages and Relationships Registration Bill, Government Bill 296-2, Section 22B (1) and (2), Located at [www.legislation.govt.nz/bill/government/2017/0296/latest/DLM7273502.html](http://www.legislation.govt.nz/bill/government/2017/0296/latest/DLM7273502.html), accessed 07/09/2019

<sup>125</sup> Births, Deaths, Marriages and Relationships Registration Bill, Government Bill 296-2, Section 22B (2) (b), Located at [www.legislation.govt.nz/bill/government/2017/0296/latest/DLM7273502.html](http://www.legislation.govt.nz/bill/government/2017/0296/latest/DLM7273502.html), accessed 07/09/2019

<sup>126</sup> Births, Deaths, Marriages and Relationships Registration Bill, Government Bill 296-2, Section 22B (3), Located at [www.legislation.govt.nz/bill/government/2017/0296/latest/DLM7273502.html](http://www.legislation.govt.nz/bill/government/2017/0296/latest/DLM7273502.html), accessed 07/09/2019

<sup>127</sup> Births, Deaths, Marriages and Relationships Registration Bill, Government Bill 296-2, Section 22B (4), Located at [www.legislation.govt.nz/bill/government/2017/0296/latest/DLM7273502.html](http://www.legislation.govt.nz/bill/government/2017/0296/latest/DLM7273502.html), accessed 07/09/2019

<sup>128</sup> New Zealand Parliament, Parliamentary Business, Bills and laws, Bills (proposed laws), Births, Deaths, Marriages and Relationships Registration Bill, Located at [https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL\\_74854/births-deaths-marriages-and-relationships-registration](https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_74854/births-deaths-marriages-and-relationships-registration), accessed 04/09/2019

<sup>129</sup> NZ Herald, Bill making it easier for trans people to update birth certificate deferred, 25/02/2019, Located at [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=12207173](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12207173), accessed 03/09/2019

<sup>130</sup> Government waives fees to change registered sex on birth certificates, 1 News Now, 01/08/2019, Located at <https://www.tvnz.co.nz/one-news/new-zealand/government-waives-fees-change-registered-sex-birth->



## Other documents:

Citizenship certificates, which serve as proof of citizenship for those who become New Zealand citizens after having originally been citizens elsewhere, used a similar procedure to the one for amending birth certificates. A citizenship certificate could be re-issued with a different sex if the applicant has had their gender recognised from another country, if there had been a family court declaration already issued in accordance with section 28<sup>131</sup>. A somewhat lesser standard was used for those who were already recognised as being intersex if they wished to have their citizenship certificate reflect another sex. For this a person was required to have a name which is either unisex or suitable for the nominated sex (the standard for this is unclear) and must be living “as a member of the nominated sex” and must complete a statutory declaration<sup>132</sup>. An intersex person was also able to opt to have no gender marked on their citizenship certificate, this option was also available to transgender people who are able to demonstrate they have been living as their nominated gender and have changed their name, but do not have a family court declaration<sup>133</sup>. An intersex person may also have had their gender recorded as indeterminate or intersex if they have a birth certificate that reflects this or can produce medical evidence<sup>134</sup>. These requirements may indicate that there may have been some conflation between sex and gender, as is also seen in section 28, as both

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certificate, accessed 07/09/2019

<sup>131</sup> Citizenship office policy for transgender and intersex applicants, The Department of Internal Affairs, Located at [https://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/\\$file/Citpol15Transgenderandintersexcitapp.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/$file/Citpol15Transgenderandintersexcitapp.pdf) accessed 04/2017, page 2 para 1

<sup>132</sup> Citizenship office policy for transgender and intersex applicants, The Department of Internal Affairs, Located at [https://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/\\$file/Citpol15Transgenderandintersexcitapp.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/$file/Citpol15Transgenderandintersexcitapp.pdf) page 2 para 1

<sup>133</sup> Citizenship office policy for transgender and intersex applicants, The Department of Internal Affairs, Located at [https://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/\\$file/Citpol15Transgenderandintersexcitapp.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/$file/Citpol15Transgenderandintersexcitapp.pdf) page 2 para 2

<sup>134</sup> Citizenship office policy for transgender and intersex applicants, The Department of Internal Affairs, Located at [https://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/\\$file/Citpol15Transgenderandintersexcitapp.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/$file/Citpol15Transgenderandintersexcitapp.pdf) page 2 para 3

assumed that there is a way of living which corresponds to having a certain sex. Citizenship certificates largely relied on Family Court declarations and the procedure for altering ones recorded sex if one is intersex is slightly more rigorous than that required by section 28 as it also requires a name change. The name change is an interesting requirement, as it seems odd that there would be sufficient public interest in preventing a person from having a sex recorded that did not “match” their name. In addition to this it seems as though it would be difficult to judge, as New Zealand does not have a list of permitted names divided by gender, instead requiring names to be confirmed<sup>135</sup>, with some names such as Messiah being routinely refused authorization<sup>136</sup>. The lack of such a list means that there is no definitive source for masculine and feminine names. This may mean that such determinations may rest on whether a particular judge happens to find a particular name to be gendered appropriately or sufficiently neutral.

Since the original draft of this section the requirements to change ones gender on a citizenship certificate have changed, although the exact date of the change is not known, however use of the internet archive reveals that the policy was updated between January 2016<sup>137</sup> and April 2017<sup>138</sup>. Currently, as of September 2019, the requirements to change ones gender on their citizenship certificate are that an applicant fill in the required form for confirmation of citizenship and attach a statutory declaration which must include the gender the applicant wishes to be recognised on their citizenship certificate and how long they have been “living with” that gender identity<sup>139</sup>. This requires the payment of a fee of 112.40 NZD<sup>140</sup>.

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<sup>135</sup>Births, Deaths, Marriages, and Relationships Registration Act 1995, Public Act 1995 No.16 section 18

<sup>136</sup> First it was justice, now it's Messiah: the rejected New Zealand baby names of 2015, located at [www.stuff.co.nz/life-style/parenting/baby/79042121/First-it-was-Justice-now-its-Messiah-The-rejected-New-Zealand-baby-names-of-2015](http://www.stuff.co.nz/life-style/parenting/baby/79042121/First-it-was-Justice-now-its-Messiah-The-rejected-New-Zealand-baby-names-of-2015)

<sup>137</sup>Internet Archive, Capture of [http://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/\\$file/Citpol15Transgenderandintersexcitapp.pdf](http://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/$file/Citpol15Transgenderandintersexcitapp.pdf), January 26 2016, Located at [https://web.archive.org/web/20160126085320/http://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/\\$file/Citpol15Transgenderandintersexcitapp.pdf](https://web.archive.org/web/20160126085320/http://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/$file/Citpol15Transgenderandintersexcitapp.pdf), accessed 12/09/2019

<sup>138</sup>Internet Archive, Capture of [http://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/\\$file/Citpol15Transgenderandintersexcitapp.pdf](http://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/$file/Citpol15Transgenderandintersexcitapp.pdf), April 15 2017, Located at [https://web.archive.org/web/20160126085320/http://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/\\$file/Citpol15Transgenderandintersexcitapp.pdf](https://web.archive.org/web/20160126085320/http://www.dia.govt.nz/diawebsite.nsf/Files/Citpol15Transgenderandintersexcitapp/$file/Citpol15Transgenderandintersexcitapp.pdf), accessed 12/09/2019

<sup>139</sup> Passports; citizenship and identity, Changing your gender, Choosing the gender on your citizenship record, New Zealand Government, Located at, <https://www.govt.nz/browse/passports-citizenship-and-identity/changing-your-gender/choosing-the-gender-on-your-citizenship-record/>, accessed 10/09/2019

<sup>140</sup> Department of Internal Affairs, Application for confirmation of New Zealand citizenship by grant, New

## Passports:

In contrast to citizenship certificates, the altering of passports seems to have a less rigorous procedure for gender recognition. As well as allowing for identification as a third gender (X) a person's gender can be altered on a passport simply by applying for a new passport and accompanying the passport with a statutory declaration<sup>141</sup>. It is worth noting that while a person can apply to have their gender on their passport as "M, F or X"<sup>142</sup> the form for a new passport which must be filled in to change one's gender on their passport presents options only to be recognised as male or female.<sup>143</sup> The application for a new passport has a required fee of 191 New Zealand Dollars, or more if the application is filed overseas<sup>144</sup>. There is no requirement for an additional fee for change of gender. The declaration does require some evidence as to how long a person has lived as the gender they wish recognised on the passport<sup>145</sup>, although no guidance is given as to what "maintaining" a gender means in this context. Aside from the requirement for evidence of "maintaining" one's gender, this is somewhat similar to the self-identification model of gender recognition. This model, currently seen in Ireland<sup>146</sup> and Malta<sup>147</sup>, allows a person to change their legal gender through a similar declaration. However these states use the self-identification model for sex on birth certificates, rather than solely for gender on passports.

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Zealand Government, Located at <https://www.govt.nz/dmsdocument/7520~Application-for-confirmation-of-NZ-citizenship-by-grant.pdf>, accessed 10/09/2019

<sup>141</sup> The Department of Internal Affairs, Information about Changing Sex/Gender Identity, The Department of Internal Affairs, Located at <https://www.passports.govt.nz/Transgender-applicants>, accessed 04/09/2019

<sup>142</sup> Identity and passports, What you need to renew or apply for a passport, Information about changing sex / Gender Identity, Located at <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/>, accessed 04/09/2019

<sup>143</sup> Application for a New Zealand Passport, PAS310 03/19, Page 1, Located at <https://www.passports.govt.nz/assets/Uploads/Forms/3db38de86c/Adult-new.pdf>, accessed 04/09/2019

<sup>144</sup> Application for a New Zealand Passport, PAS310 03/19, Page 11, Located at <https://www.passports.govt.nz/assets/Uploads/Forms/3db38de86c/Adult-new.pdf>, accessed 04/09/2019

<sup>145</sup> Identity and passports, What you need to renew or apply for a passport, Information about changing sex / Gender Identity, Located at <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/>, accessed 04/09/2019

<sup>146</sup> Gender Recognition Act 2015, Number 25 of 2015

<sup>147</sup> Gender Identity, Gender Short title. Expression and Sex Characteristics Act, 2015, Act No. 11 of 2015

Drivers' licenses, similar to passports, can be amended simply through the completion of a statutory declaration which is available as a standard form<sup>148</sup>. The statutory declaration requires that the applicant state the gender they wish to be recognised as and how long they have "maintained" that gender<sup>149</sup>. However despite the requirement that the statutory declaration state how long a person has "maintained" that gender, there is no requirement that this be any particular minimum amount of time<sup>150</sup>. This has a number of advantages over the procedure for passports. Particularly noticeable is that the use of a readily available standard form allows the procedure to be done by those with no legal knowledge fairly easily and that the omission of a requirement that someone be maintaining the nominated gender for a period of time avoids the possibly thorny issue of having to decide what counts as "maintaining" a gender. Jurisdictions with similar requirements typically avoid attempting to determine what "living as" a given gender means, instead assuming that doctors and other professionals will know it when they see it or by simply taking a change of name to be sufficient evidence, as can be seen in the UK, which as a part of its gender recognition process requires a person be "living in the other gender"<sup>151</sup>, but has no guidelines as to what that means. It is worth noting that gender is not recorded on the driver's license physical document, so this process has no bearing on anything that appears on the actual document itself, but rather amends the corresponding record which is kept digitally<sup>152</sup>.

As such it seems as though any confusion regarding to what the requirements for legal gender recognition are may have been justified, as there were four different regimes relating to different documents, none of which were considered any more authoritative than the other. This resulted in a system where a person seeking gender recognition may well have to navigate multiple procedures, all with different standards and requirements. Not only does this seem inefficient, but it may well have caused confusion if a person has identity documents with differing genders recorded on them.

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<sup>148</sup> Updating your licence, NZ Transport Agency, Located at <https://www.nzta.govt.nz/driver-licences/renewing-replacing-and-updating/your-licence/>, accessed 07/09/2019

<sup>149</sup> DL25, Statutory declaration for change of gender for driver licensing and motor vehicle registration purposes, New Zealand Transport Agency, Located at <https://nzta.govt.nz/assets/resources/statutory-declaration-for-change-of-gender/docs/statutory-declaration-for-change-of-gender-dl25.pdf>, accessed 07/09/2019

<sup>150</sup> Updating your licence, New Zealand Transport Agency, Located at <https://www.nzta.govt.nz/driver-licences/renewing-replacing-and-updating/your-licence/>, accessed 07/09/2019

<sup>151</sup> Gender Recognition Act 2004, Section 1 (1)

<sup>152</sup>, Updating your licence, New Zealand Transport Agency, Located at <https://www.nzta.govt.nz/driver-licences/renewing-replacing-and-updating/your-licence/>, accessed 07/09/2019

However over time the various ways in which gender is recognised on official documents have been somewhat harmonized, with the most common requirement now being simply for a statutory declaration and some indication as to how long a person has “maintained” their gender identity<sup>153</sup>. The requirements for amending one’s gender on their birth certificate remain unchanged, rendering it somewhat of an anomaly within the now somewhat harmonized system.

### Prisons:

Besides identity documents, another area where a person’s sex frequently becomes relevant is when interacting with the criminal justice system, particularly when it comes to imprisonment. New Zealand Police policy requires that any searches which require the person being searched to be unclothed or covered only by underwear (strip searches) to be conducted by a person of the same gender as the person being searched<sup>154</sup>. The policy specifically requires that the person conducting the search have the same “gender identity”<sup>155</sup> as the person being searched, while the policy does not explicitly mention transgender people, the use of such a term may imply that it refers to a transgender-inclusive understanding of gender, and is not conflating gender and sex. There is no specific guidance on searching intersex individuals or people whose sex and gender are recorded as indeterminate, however the lack of an explicit mention may mean that there is no exception made, and the general rule requiring searches to be conducted by a person of the same gender identity applies.

For housing purposes prisoners are separated based on sex, with the only two options being male and female<sup>156</sup>. In the governing policy document on transgender and intersex prisoners,

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<sup>153</sup>This being the case at the time of writing for passports, citizenship certificates and driver’s licenses.

<sup>154</sup> Policies, Guidelines for Conducting Strip Searches, New Zealand Police, 03/2018, Located at <https://www.police.govt.nz/about-us/publication/guidelines-conducting-strip-searches>, accessed 10/09/2019

<sup>155</sup> Policies, Guidelines for Conducting Strip Searches, New Zealand Police, 03/2018, Located at <https://www.police.govt.nz/about-us/publication/guidelines-conducting-strip-searches>, accessed 10/09/2019

<sup>156</sup> Prison operations manual, M.03.05 transgender and intersex prisoner, Department of Corrections, Located at [www.corrections.govt.nz/resources/policy\\_and\\_legislation/Prison-Operations-Manual/Movement/M.03-](http://www.corrections.govt.nz/resources/policy_and_legislation/Prison-Operations-Manual/Movement/M.03-)

the concepts of gender and sex are conflated, with gender being used to mean physical sex<sup>157</sup>. As such only physical sex is considered.

If there is a question about a prisoner's sex, either due to claims the prisoner makes or documentation causing confusion, a determination must be made by the custodial systems manager or on-call manager<sup>158</sup>. This determination must take into account relevant documentation and evidence from medical experts. However, regardless of other information, the birth certificate of the prisoner, if it is available, is regarded as authoritative<sup>159</sup>. This means that regardless of other circumstances a person's sex is deemed to be the one on their birth certificate, despite the process to amend the certificate, as shown above, being somewhat difficult to navigate. A 2016 equal justice project research paper found a number of problems with the reliance on biological sex, including that those from lower socio-economic backgrounds may be unable to undergo the recognition process and thus would never be able to be rehoused in prison<sup>160</sup>. The 2008 report also found that this policy may be discriminatory, as it disproportionately disadvantages Maori people and those transgender people who are assigned female at birth, as both groups are less likely to be able to have surgery and are less likely to amend their birth certificates<sup>161</sup>.

If the initial determination is not correct, an appeal may be made. This requires a report from the prison director as well as the health centre manager, The Chief Custodial Officer and the Director of Offender Health. This review is done by the Chief executive<sup>162</sup>.

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Specified-gender-and-age-movements/M.03-4.html, accessed 10/09/2019

<sup>157</sup> This occurs throughout M.03.05.01

<sup>158</sup> Prison operations manual, M.03.05 transgender and intersex prisoner, Department of Corrections, Located at [www.corrections.govt.nz/resources/policy\\_and\\_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html](http://www.corrections.govt.nz/resources/policy_and_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html), accessed 10/09/2019 at M.03.05.01 paragraph 1

<sup>159</sup> Prison operations manual, M.03.05 transgender and intersex prisoner, Department of Corrections, Located at [www.corrections.govt.nz/resources/policy\\_and\\_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html](http://www.corrections.govt.nz/resources/policy_and_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html), accessed 10/09/2019 at M.03.05.01 paragraph 2

<sup>160</sup> The rights of Transgender people in prisons, Research paper prepared for the equal justice project symposium 11 may 2016, Maree Cassaidy and Linda Lim, located at [equaljusticeproject.co.nz/wp-content/uploads/2015/05/Transgender-People-in-Prisons-Research-Paper-final2.pdf](http://equaljusticeproject.co.nz/wp-content/uploads/2015/05/Transgender-People-in-Prisons-Research-Paper-final2.pdf) page 8 para 3

<sup>161</sup> Human rights commission report: to be who I am, Report of the inquiry into discrimination experienced by transgender people 2007 located at [https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008\\_14-56-48\\_HRC\\_Transgender\\_FINAL.pdf](https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf) at 8.38

<sup>162</sup> Prison operations manual, M.03.05 transgender and intersex prisoner, Department of Corrections, Located at [www.corrections.govt.nz/resources/policy\\_and\\_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html](http://www.corrections.govt.nz/resources/policy_and_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html), accessed 10/09/2019 at M.03.05.04

In the event that the prisoner produces a birth certificate which lists their sex as indeterminate, the evaluation is immediately escalated to the office of the National Commissioner of the Department of Corrections who will receive reports from the Chief Custodial Officer and the Director of Offender Health<sup>163</sup>. Beyond the fact that this escalation occurs there is no other guidance available on how the decisions relating to these inmates are made. It seems as though there is no set standard for dealing with indeterminate sex, with each case being dealt with individually. While this may be logistically possible due to the small number of cases, this approach may pose a problem when it comes to consistency and transparency.

The treatment of transgender prisoners has also been criticised due to the lack of appropriate medical care<sup>164</sup>. This is relevant, as the standard to have one's birth certificate amended, as mentioned previously<sup>165</sup>, requires at least some medical treatment. Transgender prisoners who began taking hormones without a prescription, a practice known as self-medicating, are not permitted to continue taking them in prison. It is also not possible for any transgender prisoner to acquire a prescription while in custody, under rule M.03.05.02(h)<sup>166</sup>. This situation has been criticised by the New Zealand law society<sup>167</sup> as it may violate the New Zealand Bill of Rights Act 1990 and Human Rights Act 1993 due to being inherently discriminatory.

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<sup>163</sup>Prison operations manual, M.03.05 transgender and intersex prisoner, Department of Corrections, Located at [www.corrections.govt.nz/resources/policy\\_and\\_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html](http://www.corrections.govt.nz/resources/policy_and_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html), accessed 10/09/2019 at M.03.05.04 paragraph 5

<sup>164</sup> Human rights commission report: to be who I am, Report of the inquiry into discrimination experienced by transgender people 2007 located at [https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008\\_14-56-48\\_HRC\\_Transgender\\_FINAL.pdf](https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf) at 4.84

<sup>165</sup> Page 24

<sup>166</sup>Prison operations manual, M.03.05 transgender and intersex prisoner, Department of Corrections, Located at [www.corrections.govt.nz/resources/policy\\_and\\_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html](http://www.corrections.govt.nz/resources/policy_and_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html) at M.03.05.02(h)

<sup>167</sup> Policy changes on transgender prisoners, a step forward? LawTalk, New Zealand Law Society, 22 November 2013, located at <https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-832/policy-changes-on-transgender-prisoners-a-step-forward>

## Marriage

Other than prisons and the criminal justice system the second major area where sex is often relevant is marriage. Sex often becomes an issue when it comes to marriage due to the traditional notion in many cultures that marriage should be restricted to being between men and women, with people only permitted to marry the “opposite” sex to themselves<sup>168</sup>, with 23 countries allowing marriage regardless of the sex or gender of the participants<sup>169</sup>.

When it comes to transgender, people with non-binary genders and intersex people, the legal rules surrounding marriage can often be complex. Many jurisdictions which have common law systems were heavily influenced by the decision in *Corbett v Corbett*<sup>170</sup>, which defined gender as sex for the purposes of marriage, this restricting transgender people to marrying the “opposite” sex to the one they were assigned at birth<sup>171</sup>. That case concerned whether a marriage between a man and a post-operative male to female transsexual was void as marriage was only possible between a man and a woman. That court found not only was marriage dependent on physical sex but also that surgery was not sufficient to alter one’s biological sex as it did not alter a person’s sex chromosomes. This case heavily influenced the legal systems in a large number of jurisdictions<sup>172</sup>. While influenced by Corbett, New Zealand diverted from it with the case of *M v M* in 1993<sup>173</sup>. The court chose to depart from the biologically deterministic view of Corbett stating that:

“In the absence of any binding authority which requires me to accept biological structure as decisive, and indeed any medical evidence that it ought to be, I incline to the view that

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<sup>168</sup> Hyde v Hyde and Woodmansee (1866) LR 1 P & D 130, 133

<sup>169</sup> Religion and public life, polling and analysis, Gay marriage around the world, Pew Research Center, June 26 2015, located at [www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/](http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/), accessed 17/01/2021

<sup>170</sup> Corbett v Corbett (Otherwise Ashley) [1970] 2 W.L.R. 1306

<sup>171</sup> Corbett v Corbett (Otherwise Ashley) [1970] 2 W.L.R. 1306 at 107 para 1

<sup>172</sup> SOGI casebook introduction, chapter nine: transgender marriage, International Commission of Jurists, Located at [www.icj.org/sogi-casebook-introduction/chapter-nine-transgender-marriage/](http://www.icj.org/sogi-casebook-introduction/chapter-nine-transgender-marriage/), accessed 10/09/2019, Para 7

<sup>173</sup> M v. M, [1991] NZFLR 337



however elusive the definition of “woman” may be, the applicant came within it for the purposes of and at the time of the ceremony of marriage”<sup>174</sup>

While this Judgement acknowledged the complex nature of gender and sex, it also created a situation where there was no certain rule for determining sex for the purposes of marriage. As a result the Attorney General sought a declaratory judgement as to what the law on transgender marriage is in general, rather than in a specific case<sup>175</sup>. This judgement came in *Attorney-General v. Family Court at Otahuhu*<sup>176</sup>. While still rejecting the notion in Corbett that sex is chromosomal and cannot be changed by surgery<sup>177</sup>, the court in this case did not go as far as the statement in *M v M* that the definition of “woman” may be somewhat elusive. Instead the court opted for a somewhat more practical approach. They did not opt for an approach reflective of the complexity of gender and sex, and instead opted for an approach based on binary biological sex. As such the court ruled that physical sex was still the determining factor in eligibility for marriage, and only addressed male and female as possible sexes. However the court did find that surgical procedures were sufficient to allow a person to be considered to be a sex not assigned to them at birth<sup>178</sup>. The court also dismissed arguments relating to the safety of children and other policy concerns raised in opposition to allowing a person to change their sex for the purposes of marriage stating that “no social advantage in the law not recognising the validity of the marriage of a transsexual in the sex of reassignment. It would merely confirm the factual reality.”<sup>179</sup>

Following this New Zealand implemented civil unions in 2004<sup>180</sup>, allowing couples of the same sex to have a legal relationship similar to marriage but different in name. Unlike some implementations, such as the Civil Partnership Act 2014 in the United Kingdom,<sup>181</sup> in New Zealand the implementation of civil unions allowed both same sex and opposite sex couples to enter into civil unions.<sup>182</sup> This avoids the possible complication that could be caused when

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<sup>174</sup>*M v. M*, [1991] NZFLR 337 para 35

<sup>175</sup> SOGI casebook introduction, chapter nine: transgender marriage, International Commission of Jurists, Located at [www.icj.org/sogi-casebook-introduction/chapter-nine-transgender-marriage/](http://www.icj.org/sogi-casebook-introduction/chapter-nine-transgender-marriage/) para 9

<sup>176</sup> *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603

<sup>177</sup> *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603, at 606 para 3

<sup>178</sup> *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603, at 615 line 1

<sup>179</sup> *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603, at 607 para 4

<sup>180</sup> Civil Union Act 2004, Public Act 2004 No102

<sup>181</sup> Civil Partnership Act 2014 c.33

<sup>182</sup> Civil Union Act 2004, public act 2004 No102, Section 4 (1)

the legal gender of a person is uncertain, as they would still be able to enter into a civil union no matter their gender.

Following the Civil Unions Act the government of New Zealand passed the Marriage (Definition of Marriage) Amendment Act in 2013<sup>183</sup>. Section 4 of the Act explicitly states that the sex of those involved is no longer relevant with regards to marriage<sup>184</sup>. As such there should be no complications with regards to sex or gender, be they binary or non-binary with regards to marriage in New Zealand so long as this law remains in force. Particularly notable was that the Marriage (Definition of Marriage) Amendment Act repealed section 30 of the Births, Deaths, Marriages, and Relationships Registration Act 1995<sup>185</sup>, which had prevented persons in a marriage from having the sex on their birth certificate amended until their marriage was dissolved<sup>186</sup>.

## Conclusion

Overall the law in New Zealand with regards to gender recognition can be characterised as having four distinguishing features: The unusual approach to recognising indeterminate sex, the use of family court declarations for gender/sex recognition, the reliance by elements of the system on recorded sex and the adaptations in other areas such as drivers licenses, citizenship certificates and passports that grant recognition despite the peculiarities of how birth certificates are addressed.

The approach taken to recognising indeterminate sex at birth has a few interesting features. As discussed above a person may be recorded as having indeterminate sex at birth, but may not amend their birth certificate to reflect that later in life unless some note was made of their

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<sup>183</sup>Marriage (Definition of Marriage) Amendment Act 2013, Public Act 2013 No 20

<sup>184</sup>Marriage (Definition of Marriage) Amendment Act 2013, Public Act 2013 No 20 section 4

<sup>185</sup>Marriage (Definition of Marriage) Amendment Act 2013, Public act 2013 No 20 Section 9

<sup>186</sup>As mentioned in NZ Human rights commission, summary of human rights in New Zealand 2010., The rights of sexual and gender minorities, located at [https://www.hrc.co.nz/files/1914/2388/0525/HRNZ\\_10\\_rights\\_of\\_sexual\\_and\\_gender\\_minorities.pdf](https://www.hrc.co.nz/files/1914/2388/0525/HRNZ_10_rights_of_sexual_and_gender_minorities.pdf), at 333 para 1

indeterminacy at birth<sup>187</sup>. It is also easier to have ones recorded sex changed from indeterminate to one of the binary genders (male or female) than it is to move from one binary position to the other. It is also not possible to be registered as of indeterminate sex if the indeterminacy arises later in life. In recognising intersex status in such a way the system acknowledges that intersex people exist, and may avoid the difficulties stemming from pressure to identify an infant's sex as one of the binary options. However this approach, while it may potentially remove a legal pressure to sex someone as male or female, which may reduce the impetus to perform "corrective" surgery on intersex infants, this notion has been criticised as lacking in evidential basis<sup>188</sup>. This method of recognition, particularly how indeterminate status is implemented in such a way that it exists seemingly with the hope that a person can end their indeterminacy through the easier method for altering their birth certificate. Not only does it exist as a status to be escaped, but it also cannot be entered later in life, regardless of a person's physical status unless a record is made at birth. Also the use of the term indeterminacy is interesting, as it reflects an understanding of intersex status as perhaps some sort of desolate and hostile no-man's land in-between sexes, in which ones "true" sex cannot be determined. It may reflect an understanding in which intersex is seen not as a part on a natural spectrum of sexual variation, but as an unfortunate gap of ambiguity in-between the two binary sexes, which a person would not want to be voluntarily recognised as a part of, but would want to one day be able to escape from.

The use of family court declarations is fairly simple, although it is interesting to note that it forms a part of a trend often seen in gender recognition legislation in which a person's status must be confirmed by some authority, and that a person must have met certain criteria so that the sexual binary may be kept as intact as possible. Since the removal of a requirement to have surgery<sup>189</sup>, and thus the removal of a key measure to ensure all persons recognised as being a given sex had certain features in common, it may be interesting to see if New Zealand moves towards a gender recognition system reliant on self-identification, such as that in

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<sup>187</sup> Department of Internal Affairs, General information regarding Declarations of Family Court as to sex to be shown on birth certificates, located at [https://www.dia.govt.nz/diawebsite.nsf/Files/GeninfoDeclarationsofFamilyCourt/\\$file/GeninfoDeclarationsofFamilyCourt.pdf](https://www.dia.govt.nz/diawebsite.nsf/Files/GeninfoDeclarationsofFamilyCourt/$file/GeninfoDeclarationsofFamilyCourt.pdf) page 4 para 7 which is an explanation of section 28 (a) ii

<sup>188</sup> The "Normalization" of Intersex Bodies and "Othering" of Intersex Identities in Australia Carpenter, M. *Bioethical Inquiry* (2018) 15: 487. <https://doi.org/10.1007/s11673-018-9855-8>

<sup>189</sup>In the Michael case

Malta<sup>190</sup> and Ireland<sup>191</sup>. This may well be the case, as aspects of gender recognition, such as those relating to passports, citizenship certificates and driver's licenses have changed to rely solely on a statutory declaration, with birth certificates being the exception.

The use of family court declarations does have a key difference in feature to other methods of gender recognition which involve meeting set criteria which is then confirmed by an authority. This is in contrast to a gender recognition panel system, such as the one currently in use in the United Kingdom<sup>192</sup>. A family court declaration system has the advantage of using existing infrastructure and systems, so far as any system to amend birth certificates can. In this style of system there is no need to create a separate body with new members, procedures and hierarchies, as the existing family court system is used as much as possible. However, it does have a major disadvantage, one mentioned in the 2008 report, namely that of consistency. This was mentioned in the report specifically in the context of the uncertainty surrounding the requirement for surgery prior to the ruling that it was not necessary<sup>193</sup>. As in this system there is no one body making the decision, different judges reached different conclusions on what the requirement was, which led to a person's ability to obtain gender recognition being unpredictable. This consistency issue is probably the greatest difference between the panel based system and the family court declaration system.

The next major distinguishing feature of gender recognition in New Zealand is the reliance on sex. This is mainly evident with regards to birth certificates and the prison system. Birth certificates only record sex, the prison system houses inmates by sex and regards birth certificates as authoritative<sup>194</sup>. Gender is recorded on passports<sup>195</sup>, but while sex on a birth

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<sup>190</sup> Gender Identity Gender Expression and Sex Characteristics Act 2015, ACT No. XI of 2015

<sup>191</sup> Gender Recognition Act 2015, Number 25 of 2015

<sup>192</sup> As set out in the Gender Recognition Act 2004

<sup>193</sup> Human rights commission report: to be who I am, Report of the inquiry into discrimination experienced by transgender people 2007 located at [https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008\\_14-56-48\\_HRC\\_Transgender\\_FINAL.pdf](https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf), accessed 17/12/2020, at 8.44

<sup>194</sup> As set out in Department of Corrections, prison operations manual, M.03.05 transgender and intersex prisoner, located at [www.corrections.govt.nz/resources/policy\\_and\\_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html](http://www.corrections.govt.nz/resources/policy_and_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html)

<sup>195</sup> While the ICAO standards refer to gender, as shown in Doc 9303, Machine readable Travel Documents, seventh edition, 2015, part 4: specifications for machine readable passports (MRPs) and other TD3 Size MRTDs, the International Civil Aviation Organisation, Located at [www.icao.int/publications/Documents/9303\\_p4\\_cons\\_en.pdf](http://www.icao.int/publications/Documents/9303_p4_cons_en.pdf) page 7, the New Zealand government advice

certificate may be used as evidence of gender, it is not solely authoritative, and it is much easier to change one's gender on one's passport than it is to change sex on a birth certificate. Gender and sex are often used interchangeably, and when a person's gender becomes legally relevant the deciding factor, as was the case both in prisons and in marriage prior to 2013 (when the gender requirement for marriage was removed<sup>196</sup>), seems to be physical sex. As such the system is largely reliant on sex, rather than gender which is while it is recorded does not seem to be used in the way sex is. Unfortunately, when sex does become relevant it is usually in the context of determining if a person is male or female, or to be treated as male or female, which can create difficulty when a person's sex is recorded as indeterminate. However it is worth noting that the reliance on sex has diminished over time, with the passport and citizenship certificate systems both moving towards a statutory declaration based model with no other evidence required.

This leads to the final major interesting feature of gender recognition in New Zealand, that because there is no one authoritative mode of gender recognition, the "gender recognition system" is made of numerous independent sub systems, each authoritative only in their own domain. The result of this is that different aspects of the system have changed at different rates, and in some cases have adopted different methods of recognition and evidential requirements.

An interesting example of this is the prison system and its interaction with the system of recognition related to birth certificates. While the prison system itself has come under some scrutiny and criticism for its various gender related policies and reliance on sex recorded on birth certificates<sup>197</sup>, is not totally reliant on the rules and limitations of the birth certificate system. If it were to rely totally on the birth certificate system then it would be unable to address intersex persons who were not assigned such at birth or did not have a note

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refers to both sex and gender as though they are interchangeable or the same Passports.govt.nz, The Department of Internal Affairs, Information about Changing Sex / Gender Identity located at <https://www.passports.govt.nz/Transgender-applicants>

<sup>196</sup>Marriage (Definition of Marriage) Amendment Act 2013, Public act 2013 No 20 section 4

<sup>197</sup>For example The rights of Transgender people in prisons, Research paper prepared for the equal justice project symposium 11 may 2016, Maree Cassaidy and Linda Lim, located at [equaljusticeproject.co.nz/wp-content/uploads/2015/05/Transgender-People-in-Prisons-Research-Paper-final2.pdf](http://equaljusticeproject.co.nz/wp-content/uploads/2015/05/Transgender-People-in-Prisons-Research-Paper-final2.pdf) page 8 para 3 and Human rights commission report: to be who I am, Report of the inquiry into discrimination experienced by transgender people 2007 located at [https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008\\_14-56-48\\_HRC\\_Transgender\\_FINAL.pdf](https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf) at 8.38

demonstrating this made at their time of birth, and would have to rely solely on the binary sex noted on the birth certificate. However if an inmates sex is recorded as indeterminate the case is immediately escalated to the appeal stage where the case will be examined on an individual basis<sup>198</sup> This avoids the problem of the birth certificate system accommodating only a binary model of sex without requiring any alterations to be made to the Births, Deaths, Marriages and Relationships Registration Act. It does however run the risk of being inconsistent and unpredictable, but it may represent a viable model for how intersex prisoners can be dealt with in those systems that only allow consideration of sex and that in all other aspects only cater to binary sex.

The requirements for gender/sex relating to marriage have also changed in such a way that has eliminated a number of problems for transgender and intersex people due to the introduction of “gender blind” marriage in Marriage (definition of Marriage) Amendment Act<sup>199</sup>. This can be contrasted with certain implementations of same-sex marriage which still require a differentiation between homosexual and heterosexual relationships, such as the UK, which has resulted in a complex series of rules and requirements for gender recognition which vary based on one’s marital / civil union status<sup>200</sup>. This is an example of a situation in which, rather than changing gender / sex recognition rules to accommodate the existence of transgender and intersex people, a social change occurred which allowed for a distinction between genders in the law to be removed entirely. As such, while it achieves the same end of equal access to legal rights, this is accomplished through a different sort of legal change, where rather than altering the requirements under the law for gender recognition in the “relevant but not essential” zone discussed in *Corbett v Corbett*<sup>201</sup>, the law is moved from the category in which gender is relevant to that in which it is irrelevant and gender recognition is therefore unnecessary.

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<sup>198</sup> Prison operations manual, M.03.05 transgender and intersex prisoner, Department of Corrections, Located at [www.corrections.govt.nz/resources/policy\\_and\\_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html](http://www.corrections.govt.nz/resources/policy_and_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html) at M.03.05.04 paragraph 5

<sup>199</sup> Marriage (Definition of Marriage) Amendment Act 2013, Public act 2013 No 20

<sup>200</sup> Gender Recognition Act 2004 Section 11

<sup>201</sup> *Corbett v Corbett* (Otherwise Ashley) [1970] 2 W.L.R. 1306

Because the lack of one definitive “legal gender” allows the gender recognition rules for each document to be altered independently the relatively high evidential requirements of the birth certificate amendment procedure need not necessarily need to impact the passport, driver’s license and citizenship certificate rules. All three of these identity documents recognise non-binary genders in addition to the “indeterminate” sex recognised by birth certificates and allow those categories to be entered later in life. They also all have less rigorous criteria for change of gender/sex than birth certificates. These three identity documents, unlike birth certificates, do not have their gender/sex recognition procedures set out in statute. As such it appears that they are able to provide not only more recognition in terms of non-binary gender identities, but also less rigorous criteria because their rules are easier to amend and alter. However this is far from certain, as there may be valid reasons to why the rules regarding birth certificates have not been amended other than that there is difficulty in altering or replacing the statute, including lack of political will or other practical concerns. However as demonstrated by statements made relating to the Births, Deaths, Marriages and Relationships Registration Bill<sup>202</sup> the level of debate, scrutiny and controversy inherent in such amendments may play a significant role in the failure of the bill to progress.

An interesting possibility is that it may not be desirable to make altering a birth certificate easier as it has an additional purpose other than as an identity document. Birth certificates may also function as historical documents, recording who was born and their status at that time. As such easy amendment may not be desirable, as it essentially alters the historical record. It may well be that the gender recognition system in New Zealand may, for all of its inconsistencies, form the beginning of a model in which the birth certificate is unalterable, as it is a historical document, and other documents are used for identity purposes. However in its current form, with multiple forms of identification and the birth certificate being authoritative in so many situations it is probable that the gender recognition system still has quite some way to go to improve. Its transition into such a model would only be complete once no other

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<sup>202</sup> Bill making it easier for trans people to update birth certificate deferred, NZ Herald, 25/02/2019, Located at [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=12207173](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12207173), accessed 03/09/2019

part of the system relies on sex recorded on birth certificates, as is currently done in the prison system. However it is worth noting that even such a system may have significant drawbacks. As discussed in cases at the ECHR regarding gender recognition, a transgender person can suffer stigma, discrimination or humiliation if they are “outed” by having documentation which is incongruent with their identity<sup>203</sup>. This, while other factors may have been more decisive<sup>204</sup>, formed a crucial part of the *Goodwin v UK* judgement which required the UK to introduce more centralized gender recognition in the form of the Gender Recognition Act. As shown in that case the UK at the time did allow a transgender person in individual cases to have their gender recognised for specific purposes<sup>205</sup>. Because of this it should be considered that while system with diverse methods of gender recognition for various official purpose may be desirable, having any mismatch between a person’s identity and a document with more onerous recognition criteria may have a strong negative impact on that person’s life which may be unacceptable.

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<sup>203</sup> *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 at paragraph 77

<sup>204</sup> Such as the development of perceived international consensus. As shown in *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 at paragraphs 84-85

<sup>205</sup> *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 at paragraph 73



## The legal situation in Australia.

The approach taken by Australia to legal gender and sex recognition has a number of interesting aspects. Like a number of jurisdictions, Australia does not recognise legal gender or sex in any one unified way. While the most common way to recognise sex is through a birth certificate, there is a separate standard of evidence for having one's sex recognised on a passport. While this is a trait shared by other systems, Australia adds to the multiple methods of legal recognition by the nature of its legal system. Because Australia has a federal legal system every state and territory has its own method of recognising legal sex and having sex altered on birth certificates. This may not be a problem for residents of those states and territories, as any one person will only have to alter their birth certificate in the one state or territory of their birth. However it does add a layer of complexity to any attempt to evaluate how Australia approaches non-binary/intersex recognition, as in some aspects, such as passports, it is one jurisdiction, with regards to others, such as birth certificates, it becomes 8 jurisdictions. Australia also distinguishes itself from other jurisdictions by recognising the difference between gender and sex, and is thus far the only jurisdiction to do so. However, as will be shown later in this chapter, that recognition is now always acted upon in practice.

For ease of reading this chapter shall be subdivided into sections, the first addressing birth certificates, the second addressing passports. Following these the ways recognition interacts

with the rest of the legal system shall be examined, beginning with prisons and then addressing marriage.

### Birth certificates:

In many jurisdictions the alteration of birth certificates to recognise sex/gender is a core part of that jurisdictions system of legal gender recognition. This is also the case in Australia, with a number of states/territories stating that the sex recognised on a birth certificate is that persons legal sex.

Because each state and territory addresses sex recognition on birth certificates separately, each jurisdiction shall be examined in turn, followed by a section comparing the various systems. For the sake of brevity the focus shall be on the procedures for adults, although it is worth noting that all of the states and territories do allow similar procedures for children with parental involvement.

### Australian Capital Territory

In the Australian capital territory the rules governing the change of sex on birth certificates can be found in part 4 of the Births, Deaths and Marriages Registration Act 1997<sup>206</sup>. Section 24 of the act allows anyone who's birth is registered in the ACT(Australian capital territory) and who is over 18 to have the register of births altered, if they have received some "appropriate clinical treatment for change of sex"<sup>207</sup>, or if they are intersex. Section 25 requires evidence in the form of a statement from a doctor or psychologist verifying that they

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<sup>206</sup> Births, Deaths and Marriages Registration Act 1997 A1997-112, Accessed from Republication No 28 Effective: 27 February 2019, Located at <https://www.legislation.act.gov.au/a/1997-112/default.asp>, accessed 14/08/2019

<sup>207</sup> Births, Deaths and Marriages Registration Act 1997 A1997-112, Section 24 (c) (I), Accessed from Republication No 28 Effective: 27 February 2019, Located at <https://www.legislation.act.gov.au/a/1997-112/default.asp> accessed 14/08/2019

have received some treatment or are intersex<sup>208</sup>. Once the register is altered a new birth certificate may be issued, which shall have no evidence of having been altered. A copy of the birth certificate as it would have been prior to alteration of the register may also be issued<sup>209</sup>, and section 28 states that it is an offence to use such a certificate to deceive<sup>210</sup>. Section 4.2 of the act also allows residents of the ACT whose births are registered elsewhere to apply for a registered details certificate, which does not alter the register but can serve as proof of a person's name and sex<sup>211</sup>.

Due to amendments introduced by the Births, Deaths and Marriages Registration Amendment Act 2014<sup>212</sup> a person may change their birth certificate to recognise them as intersex as well as male or female<sup>213</sup>. The Amendment Act also amended the Legislation Act 2001<sup>214</sup> to include a statutory definition of intersex which defines an intersex person as:

“An *intersex person* is a person who has physical, hormonal or genetic features that are—

- (a) not fully female or fully male; or
- (b) a combination of male or female; or
- (c) not female or male.”<sup>215</sup>

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<sup>208</sup> Births, Deaths and Marriages Registration Act 1997 A1997-112, Accessed from Republication No 28 Effective: 27 February 2019, Located at <https://www.legislation.act.gov.au/a/1997-112/default.asp>, accessed 14/08/2019, Section 25

<sup>209</sup> Births, Deaths and Marriages Registration Act 1997 A1997-112, , Accessed from Republication No 28 Effective: 27 February 2019, Located at <https://www.legislation.act.gov.au/a/1997-112/default.asp>, accessed 14/08/2019, Section 27

<sup>210</sup> Births, Deaths and Marriages Registration Act 1997 A1997-112, , Accessed from Republication No 28 Effective: 27 February 2019, Located at <https://www.legislation.act.gov.au/a/1997-112/default.asp> accessed 14/08/2019, Section 28

<sup>211</sup> Births, Deaths and Marriages Registration Act 1997 A1997-112, Accessed from Republication No 28 Effective: 27 February 2019, Located at <https://www.legislation.act.gov.au/a/1997-112/default.asp>, accessed 14/08/2019, Section 29A

<sup>212</sup> Births, Deaths and Marriages Registration Amendment Act 2014 A2014-8

<sup>213</sup> Births, Deaths and Marriages Registration Amendment Act 2014 A2014-8, Section 8 (c) (ii)

<sup>214</sup> Legislation Act 2001 A2001-14 Section 169B

<sup>215</sup> Births, Deaths and Marriages Registration Amendment Act 2014 A2014-8 Schedule 1 Part 1.2

The ACT also includes information on change of sex on birth certificates in their births, deaths and marriages practice manual<sup>216</sup>. The manual also notes that in addition to changing one's birth certificate to recognise their intersex status, it is also possible for a person to be registered as intersex from birth due to a policy change<sup>217</sup>. It states that "This category can be nominated by individuals who are intersex or who identify as having an indeterminate or unspecified sex."<sup>218</sup>. This use of the phrase "intersex or who identify as having an indeterminate or unspecified sex" is interesting, as it demonstrates that in addition to recognising physical characteristics that may be regarded as intersex, in this case "intersex" is also recognised as a form of identity, which is similar to how it is addressed with regards to passports and as such this notion will be discussed more in depth in that section.

All of the applications under the act relating to change of sex can be done using a standardised form available through the access Canberra website<sup>219</sup>. There is a fee of 48 dollars (Australian) to alter the registration of birth, 118 to alter both the registration and the certificate<sup>220</sup>.

## New South Wales

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<sup>216</sup> Justice and Community Safety, Births, Deaths and Marriages Practice Manual, ACT Government, April 2014, Located at <https://www.accesscanberra.act.gov.au/ci/fattach/get/45848/1433984222/redirect/1/filename/Births%20deaths%20and%20marriages%20practice%20manual.pdf>, accessed 14/08/2019

<sup>217</sup> Justice and Community Safety, Births, Deaths and Marriages Practice Manual, April 2014, ACT Government, Located at <https://www.accesscanberra.act.gov.au/ci/fattach/get/45848/1433984222/redirect/1/filename/Births%20deaths%20and%20marriages%20practice%20manual.pdf> accessed 14/08/2019, Page 49

<sup>218</sup> Ibid

<sup>219</sup> Form 204 – ACS, available from ACT Government, Recording a change of sex on the birth register, Apply to change your sex on the birth register, Located at [https://www.accesscanberra.act.gov.au/app/answers/detail/a\\_id/1691/~/recording-a-change-of-sex-on-the-birth-register#!tabs-3](https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/1691/~/recording-a-change-of-sex-on-the-birth-register#!tabs-3) accessed 18/08/2019

<sup>220</sup> Births, deaths and marriages forms and fees, ACT Government, Located at [https://www.accesscanberra.act.gov.au/app/answers/detail/a\\_id/2214](https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/2214), accessed 18/08/2019

In New South Wales the relevant statute is part 5 of the Births, Deaths and Marriages Registration Act 1995<sup>221</sup>. Section 32B allowed a person whose birth is registered in New South Wales and who is over 18 to request that the register be altered, provided that they are unmarried and have “undergone a sex affirmation procedure”<sup>222</sup>. The application must be accompanied by statements from two doctors or other medical professionals in order to verify that the applicant has undergone a “sex affirmation procedure”, and such other documents and information as may be prescribed by the regulations<sup>223</sup>. A person who lives in NSW but whose birth was not registered there may apply, after meeting the same evidential criteria and pre requisites as mentioned previously, for their change of sex to be registered<sup>224</sup>. This does not change the details currently in the register, as their birth is registered outside New South Wales, it does allow a person’s to be treated as their recognised sex for all purposes in NSW<sup>225</sup>. After a person’s new sex has been recognised by section 32B a new birth certificate may be issues reflecting the recognised sex which must contain no evidence of the previous registered sex<sup>226</sup>. Section 32F also allows for a certificate with the originally registered sex to be issued on request<sup>227</sup>.

There are standardised forms for applications under part 5 of the Act available from the NSW registry of births, marriages and deaths website<sup>228</sup>.

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<sup>221</sup> Births, Deaths and Marriages Registration Act 62 of 1995, Located at [http://www.austlii.edu.au/au/legis/nsw/conysol\\_act/bdamra1995383/](http://www.austlii.edu.au/au/legis/nsw/conysol_act/bdamra1995383/), accessed 20/08/2019

<sup>222</sup> Births, Deaths and Marriages Registration Act 62 of 1995, Located at [http://www.austlii.edu.au/au/legis/nsw/conysol\\_act/bdamra1995383/](http://www.austlii.edu.au/au/legis/nsw/conysol_act/bdamra1995383/) accessed 20/08/2019, Section 32B

<sup>223</sup> Births, Deaths and Marriages Registration Act 62 of 1995, Located at [http://www.austlii.edu.au/au/legis/nsw/conysol\\_act/bdamra1995383/](http://www.austlii.edu.au/au/legis/nsw/conysol_act/bdamra1995383/) accessed 20/08/2019, Section 32DB

<sup>224</sup> Births, Deaths and Marriages Registration Act 62 of 1995, Located at [http://www.austlii.edu.au/au/legis/nsw/conysol\\_act/bdamra1995383/](http://www.austlii.edu.au/au/legis/nsw/conysol_act/bdamra1995383/) accessed 20/08/2019, Section 32DA

<sup>225</sup> Births, Deaths and Marriages Registration Act 62 of 1995, Located at [http://www.austlii.edu.au/au/legis/nsw/conysol\\_act/bdamra1995383/](http://www.austlii.edu.au/au/legis/nsw/conysol_act/bdamra1995383/) accessed 20/08/2019, Section 32I (1)

<sup>226</sup> Births, Deaths and Marriages Registration Act 62 of 1995, Located at [http://www.austlii.edu.au/au/legis/nsw/conysol\\_act/bdamra1995383/](http://www.austlii.edu.au/au/legis/nsw/conysol_act/bdamra1995383/) accessed 20/08/2019, Section 32E

<sup>227</sup> Births, Deaths and Marriages Registration Act 62 of 1995, Located at [http://www.austlii.edu.au/au/legis/nsw/conysol\\_act/bdamra1995383/](http://www.austlii.edu.au/au/legis/nsw/conysol_act/bdamra1995383/) accessed 20/08/2019, Section 32F

<sup>228</sup> NSW Government, Registry of Births Deaths & Marriages, Changes and corrections, Change of sex, Located at <https://www.bdm.nsw.gov.au/Pages/changes-corrections/change-of-sex.aspx#Howtoapply>, accessed 22/08/2019

The relevant statute in the Northern Territory is the Births, Deaths and Marriages Registration Act 1996<sup>229</sup>. Section 28B allowed a person to apply to have the register altered if their birth is registered in the northern territory, they were unmarried, and have undergone sexual reassignment surgery<sup>230</sup>. This application required evidence to confirm that they have undergone sexual reassignment surgery, this may take the form of statutory declarations from two medical practitioners, as well as any other evidence prescribed by regulations<sup>231</sup>. Section 28E then allows for a new birth certificate to be issued with no indication of the sex noted prior to the alteration of the registry<sup>232</sup>. A birth certificate reflecting the prior sex may also be issued, section 28G makes it an offence to use such a certificate with intent to deceive<sup>233</sup>.

In 2018 the Births, Deaths and Marriages Registration and Other Legislation Amendment Act repealed sections 28A, 28B, 28C and 28D of the Births Deaths and Marriages Registration Act<sup>234</sup>.

These sections are replaced with new versions introduced in the 2018 Act. The amended 1996 Act now allows a person to apply to have the register amended if they are an intersex person or have received appropriate medical treatment regarding their sex or gender, with the only evidence required being a letter from a psychologist or medical practitioner that this is the case<sup>235</sup>.

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<sup>229</sup> Births, Deaths and Marriages Registration Act 1996, No.26 of 1996, Located at <https://legislation.nt.gov.au/en/Bills/Births-Deaths-and-Marriages-Registration-Bill-1996?format=assented>, accessed 22/08/2019

<sup>230</sup> Births, Deaths and Marriages Registration Act 1996, No.26 of 1996, Located at <https://legislation.nt.gov.au/en/Bills/Births-Deaths-and-Marriages-Registration-Bill-1996?format=assented>, accessed 22/08/2019, Section 28B

<sup>231</sup> Births, Deaths and Marriages Registration Act 1996, No.26 of 1996, Located at <https://legislation.nt.gov.au/en/Bills/Births-Deaths-and-Marriages-Registration-Bill-1996?format=assented>, accessed 22/08/2019, Section 28C

<sup>232</sup> Births, Deaths and Marriages Registration Act 1996, No.26 of 1996, Located at <https://legislation.nt.gov.au/en/Bills/Births-Deaths-and-Marriages-Registration-Bill-1996?format=assented>, accessed 22/08/2019, Section 28E

<sup>233</sup> Births, Deaths and Marriages Registration Act 1996, No.26 of 1996, Located at <https://legislation.nt.gov.au/en/Bills/Births-Deaths-and-Marriages-Registration-Bill-1996?format=assented>, accessed 22/08/2019, Section 28G

<sup>234</sup> Births, Deaths and Marriages Registration and Other Legislation Amendment Act 2018, Act No. 30 of 2018, Located at <https://legislation.nt.gov.au/en/Bills/Births-Deaths-and-Marriages-Registration-and-Other-Legislation-Amendment-Bill-2018?format=assented>, accessed 22/08/2019, Section 6

<sup>235</sup> Ibid

Applications under section 28B may be made in person or through the post, and must be done through a standardised form<sup>236</sup>.

## Queensland

In Queensland the relevant statute is the Births, Deaths and Marriages Registration Act 2003<sup>237</sup>. Section 22 allowed a person to make an application to alter the registry provided that they have had sexual reassignment surgery and were unmarried<sup>238</sup>. Such an application must be done in the standard form, available from the Queensland Government website, and must be accompanied by statutory declarations from two doctors confirming that the applicant has undergone sexual reassignment surgery<sup>239</sup>.

The 2003 Act was amended in 2018 by the Births, Deaths and Marriages, Registration Amendment Act, which removed the requirement that an applicant be unmarried<sup>240</sup>.

## South Australia

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<sup>236</sup> Register a change of sex or gender on a birth certificate, NTGOV.AU, Located at <https://nt.gov.au/law/bdm/register-a-change-of-sex-or-gender-on-a-birth-certificate>, accessed 22/08/2019

<sup>237</sup> Births, Deaths and Marriages Registration Act 2003, Located at <https://www.legislation.qld.gov.au/view/html/inforce/current/act-2003-031>, accessed 22/08/2019

<sup>238</sup> Births, Deaths and Marriages Registration Act 2003, Located at <https://www.legislation.qld.gov.au/view/html/inforce/current/act-2003-031>, accessed 22/08/2019, Section 22

<sup>239</sup> Note a change of sex in a birth or adoption register, Queensland Government, Located at <https://www.qld.gov.au/law/births-deaths-marriages-and-divorces/birth-registration-and-adoption-records/note-a-change-of-sex-in-a-birth-or-adoption-register> accessed 22/08/2019

<sup>240</sup> Births, Deaths and Marriages, Registration Amendment Act 2018, Located at <https://www.legislation.qld.gov.au/view/html/asmade/act-2018-011>, accessed 22/08/2019, Section 3

In South Australia the alteration of birth certificates was governed by the Sexual Reassignment Act 1988<sup>241</sup>. In order to have their legal sex altered on the registry a person was required to make an application to a magistrate authorized by the governor for a recognition certificate<sup>242</sup>. A person making an application must have had some form of sexual reassignment procedure<sup>243</sup>. An applicant was required to either have had their birth registered in South Australia or have had a sexual reassignment procedure in that state<sup>244</sup>. An applicant was required to believe that the sex they are applying to be recognised as is their true sex, and must have “adopted the lifestyle and has the sexual characteristics of a person of the sex to which the person has been reassigned” and was required to have “received proper counselling in relation to his or her sexual identity”<sup>245</sup>. A copy of the application was required to be served to the minister as well as any “other person who should, in the magistrate's opinion, be served with notice of the application”. Anyone served with a copy of the application was entitled to attend the hearing of the application and make submissions to the magistrate<sup>246</sup>. As per section 8 of the act a recognition certificate was evidence that a person has undergone a reassignment procedure and was of the sex stated on the certificate<sup>247</sup>.

The Sexual Reassignment Act was repealed in 2016 by the Births, Deaths and Marriages Registration (Gender Identity) Amendment Act<sup>248</sup> which introduced new law governing the

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<sup>241</sup> Sexual Reassignment Act 1988, Located at <https://www.legislation.sa.gov.au/LZ/C/A/SEXUAL%20REASSIGNMENT%20ACT%201988.aspx>, accessed 22/08/2019

<sup>242</sup> Sexual Reassignment Act 1988, Located at <https://www.legislation.sa.gov.au/LZ/C/A/SEXUAL%20REASSIGNMENT%20ACT%201988.aspx>, accessed 22/08/2019, Section 7 (2)

<sup>243</sup> Ibid

<sup>244</sup> Sexual Reassignment Act 1988, Located at <https://www.legislation.sa.gov.au/LZ/C/A/SEXUAL%20REASSIGNMENT%20ACT%201988.aspx>, accessed 22/08/2019, Section 7 (8)

<sup>245</sup> Sexual Reassignment Act 1988, Located at <https://www.legislation.sa.gov.au/LZ/C/A/SEXUAL%20REASSIGNMENT%20ACT%201988.aspx>, accessed 22/08/2019, Section 7 (8) (b)

<sup>246</sup> Sexual Reassignment Act 1988, Located at <https://www.legislation.sa.gov.au/LZ/C/A/SEXUAL%20REASSIGNMENT%20ACT%201988.aspx>, accessed 22/08/2019, Section 7 (6)

<sup>247</sup> Sexual Reassignment Act 1988, Located at <https://www.legislation.sa.gov.au/LZ/C/A/SEXUAL%20REASSIGNMENT%20ACT%201988.aspx>, accessed 22/08/2019, Section 8

<sup>248</sup> Births, Deaths and Marriage s Registration (Gender Identity) Amendment Act 2016, Located at [https://www.legislation.sa.gov.au/LZ/V/A/2016/Births%20Deaths%20and%20Marriages%20Registration%20\(Gender%20Identity\)%20Amendment%20Act%202016\\_65.aspx](https://www.legislation.sa.gov.au/LZ/V/A/2016/Births%20Deaths%20and%20Marriages%20Registration%20(Gender%20Identity)%20Amendment%20Act%202016_65.aspx), accessed 22/08/2019



alteration of birth certificates by amending the Births, Deaths and Marriages Registration Act 1996<sup>249</sup>.

Under the amended act a person may apply to the registrar to have their sex on their birth certificate amended if they are over 18, were born in South Australia, have lived in South Australia for at least 12 consecutive months and specify a sex or gender identify which is recognised by the regulations and also provide the required evidence<sup>250</sup>. The genders /sexes currently recognised are Male, Female, Non-binary and Indeterminate/intersex/unspecified<sup>251</sup>. The required evidence is:

“a statement by a medical practitioner or psychologist certifying that the person has undertaken a sufficient amount of appropriate clinical treatment in relation to the person's sex or gender identity (including in the case of a person whose sex or gender identity has now become determinate)”<sup>252</sup>

Under the definitions listed in section 29H “clinical treatment” is specified to not necessarily require medical treatment and may include counselling or be only counselling<sup>253</sup>. The “sufficient amount of appropriate clinical treatment” is clarified to mean treatment of at least the proscribed duration<sup>254</sup>, which is “at least three separate counselling sessions totalling 135

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<sup>249</sup> Births, Deaths and Marriages Registration Act 1996, Located at <https://www.legislation.sa.gov.au/LZ/C/A/Births%20Deaths%20and%20Marriages%20Registration%20Act%201996.aspx>, accessed 22/08/2019

<sup>250</sup> Births, Deaths and Marriages Registration Act 1996, Located at <https://www.legislation.sa.gov.au/LZ/C/A/Births%20Deaths%20and%20Marriages%20Registration%20Act%201996.aspx>, accessed 22/08/2019, Section 29I

<sup>251</sup> Consumer and Business Services, Record a change of sex or gender identity - application, Government of South Australia Attorney-General's Department, Located at [https://www.sa.gov.au/\\_\\_data/assets/pdf\\_file/0010/301213/Change-of-Gender-form-170825-1644-.pdf#targetText=Following%20the%20registration%20of%20your,an%20Identity%20Acknowledgement%20Certificate'.&targetText=If%20you%20are%20born%20interstate,state%2F%20territory%20of%20your%20birth.&targetText=Initial%20all%20corrections%20and%20do,white%20out'%20or%20correcting%20fluid](https://www.sa.gov.au/__data/assets/pdf_file/0010/301213/Change-of-Gender-form-170825-1644-.pdf#targetText=Following%20the%20registration%20of%20your,an%20Identity%20Acknowledgement%20Certificate'.&targetText=If%20you%20are%20born%20interstate,state%2F%20territory%20of%20your%20birth.&targetText=Initial%20all%20corrections%20and%20do,white%20out'%20or%20correcting%20fluid), accessed 22/08/2019

<sup>252</sup> Births, Deaths and Marriages Registration Act 1996, Located at <https://www.legislation.sa.gov.au/LZ/C/A/Births%20Deaths%20and%20Marriages%20Registration%20Act%201996.aspx>, accessed 22/08/2019, Section 29K

<sup>253</sup> Births, Deaths and Marriages Registration Act 1996, Located at <https://www.legislation.sa.gov.au/LZ/C/A/Births%20Deaths%20and%20Marriages%20Registration%20Act%201996.aspx>, accessed 22/08/2019, Section 29H (1)

<sup>254</sup> Births, Deaths and Marriages Registration Act 1996, Located at <https://www.legislation.sa.gov.au/LZ/C/A/Births%20Deaths%20and%20Marriages%20Registration%20Act%201996.aspx>, accessed 22/08/2019, Section 29H (3)

minutes or counselling sessions occurring over a period of at least 6 months or medical treatment other than counselling.”<sup>255</sup>

A person born in another state or territory who lives in South Australia may apply with the same requirements and evidence to receive an identity acknowledgement certificate<sup>256</sup>. This certificate does not amend the register but has the effect of rendering a person’s sex or gender identity that which is recognised on the certificate<sup>257</sup>.

Section 29N creates an offence of using an old birth certificate to deceive which carries a maximum penalty 10,000 dollars or a 2 year custodial sentence<sup>258</sup>.

Applications must be done using the standard form and may be done in person or via post.<sup>259</sup>

## Tasmania

The relevant statute in Tasmania is part 4A of the Births, Deaths and Marriages Registration Act 1999<sup>260</sup>. Section 28A allowed a person whose birth is registered in Tasmania and is unmarried and has undergone sexual reassignment surgery to make an application to have the

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<sup>255</sup> Consumer and Business Services, Record a change of sex or gender identity - application, Government of South Australia Attorney-General's Department, Located at [https://www.sa.gov.au/\\_\\_data/assets/pdf\\_file/0010/301213/Change-of-Gender-form-170825-1644-.pdf#targetText=Following%20the%20registration%20of%20your,an%20Identity%20Acknowledgement%20Certificate'.&targetText=If%20you%20are%20born%20interstate,state%2F%20territory%20of%20your%20birth.&targetText=Initial%20all%20corrections%20and%20do,white%20out%20or%20correcting%20fluid.](https://www.sa.gov.au/__data/assets/pdf_file/0010/301213/Change-of-Gender-form-170825-1644-.pdf#targetText=Following%20the%20registration%20of%20your,an%20Identity%20Acknowledgement%20Certificate'.&targetText=If%20you%20are%20born%20interstate,state%2F%20territory%20of%20your%20birth.&targetText=Initial%20all%20corrections%20and%20do,white%20out%20or%20correcting%20fluid.) accessed 22/08/2019

<sup>256</sup> Births, Deaths and Marriages Registration Act 1996, Located at <https://www.legislation.sa.gov.au/LZ/C/A/Births%20Deaths%20and%20Marriages%20Registration%20Act%201996.aspx>, accessed 22/08/2019, Section 29O

<sup>257</sup> Births, Deaths and Marriages Registration Act 1996, Located at <https://www.legislation.sa.gov.au/LZ/C/A/Births%20Deaths%20and%20Marriages%20Registration%20Act%201996.aspx>, accessed 22/08/2019, Section 29R

<sup>258</sup> Births, Deaths and Marriages Registration Act 1996, Located at <https://www.legislation.sa.gov.au/LZ/C/A/Births%20Deaths%20and%20Marriages%20Registration%20Act%201996.aspx>, accessed 22/08/2019, Section 29N

<sup>259</sup> Births, deaths and marriages, Corrections to certificates, South Australia.gov, Located at <https://www.sa.gov.au/topics/family-and-community/births-deaths-and-marriages/corrections-to-certificates>, accessed 22/08/2019

<sup>260</sup> Births, Deaths and Marriages Registration Act 1999, Version from 1 July 2010 - present, Located at <https://www.legislation.tas.gov.au/view/html/inforce/current/act-1999-058>, accessed 23/08/2019

register altered<sup>261</sup>. This application was required to be accompanied by statutory declarations from two medical practitioners to confirm that the applicant has undergone sexual reassignment surgery<sup>262</sup>. If the application was successful a new birth certificate may have been issued, with the sex as per the alteration of the register, with a note that their sex was previously registered as “the other sex”<sup>263</sup>. Section 28E allowed for a birth certificate reflecting the sex on the register prior to alteration<sup>264</sup>, and section 28F made it an offence to use this certificate with the intent to deceive<sup>265</sup>.

On the 8<sup>th</sup> of May 2019 the Tasmanian legislature passed the Justice and Related Legislation (Marriage and Gender Amendments) Act<sup>266</sup> which introduced a number of amendments to part 4A of the 1999 Act. This introduced a number of changes in how birth certificates are dealt with, including expanding the definition of gender to include

**“gender** means –

- (a) male; or
- (b) female; or
- (c) indeterminate gender; or
- (d) non-binary; or
- (e) a word, or a phrase, that is used to indicate a person's perception of the person's self as being neither entirely male nor entirely female and that is prescribed; or

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<sup>261</sup> Births, Deaths and Marriages Registration Act 1999, Version from 1 July 2010 – present, Located at <https://www.legislation.tas.gov.au/view/html/inforce/current/act-1999-058>, accessed 23/08/2019, Section 28A

<sup>262</sup> Births, Deaths and Marriages Registration Act 1999, Version from 1 July 2010 – present, Located at <https://www.legislation.tas.gov.au/view/html/inforce/current/act-1999-058>, accessed 23/08/2019, Section 28B

<sup>263</sup> Births, Deaths and Marriages Registration Act 1999, Version from 1 July 2010 – present, Located at <https://www.legislation.tas.gov.au/view/html/inforce/current/act-1999-058>, accessed 23/08/2019, Section 28D

<sup>264</sup> Births, Deaths and Marriages Registration Act 1999, Version from 1 July 2010 – present, Located at <https://www.legislation.tas.gov.au/view/html/inforce/current/act-1999-058>, accessed 23/08/2019, Section 28E

<sup>265</sup> Births, Deaths and Marriages Registration Act 1999, Version from 1 July 2010 – present, Located at <https://www.legislation.tas.gov.au/view/html/inforce/current/act-1999-058>, accessed 23/08/2019, Section 28F

<sup>266</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, Located at <https://www.legislation.tas.gov.au/view/html/asmade/act-2019-007>, accessed 23/08/2019

(f) a word or phrase that is used to indicate a person's perception of the person's self as being neither entirely male nor entirely female.”<sup>267</sup>

As well as this fairly significant change the Amendment Act also permits registration of birth to be delayed up to 120 days if a child has ambiguous sexual characteristics<sup>268</sup> while still requiring infants to be registered as either male or female<sup>269</sup>. It also removes the requirement for the mother and father to be listed on the register, instead simply referring them both as parents<sup>270</sup>, which may be useful to parents in same sex relationships as well as parents who identify with anon-binary gender identity or are otherwise trans.

The 2019 Act also changed the process and requirements for gender recognition after the initial registration of the birth. The new process does not require the two medical practitioners letter and instead allows a person over 16 to have their gender registered if they sign a “gender declaration” and produce “any other document or information that the Registrar reasonably requires, other than a medical certificate, or other medical document, in relation to the sex, sexual characteristics or gender of the person”<sup>271</sup>. Applications must also be done in a standard form which is not yet available<sup>272</sup>. If the applicant is between the ages of 16 and 18 they can be required to provide evidence of counselling<sup>273</sup>. A new birth certificate may be requested either with or without notation of previous recognised sexes<sup>274</sup>. It is worth noting that despite allowing a larger variety of genders to be registered due to allowing any word or phrase expressing ones identity as neither entirely male or female the amended legislation still states that a person’s gender is the registered one for the purposes of any law in force in the state<sup>275</sup>. This may pose problems for gendered laws that denote only male or female genders, however other measures in the Amendment Act seem to indicate a

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<sup>267</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, Located at <https://www.legislation.tas.gov.au/view/html/asmade/act-2019-007>, accessed 23/08/2019, Section 14

<sup>268</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, Located at <https://www.legislation.tas.gov.au/view/html/asmade/act-2019-007>, accessed 23/08/2019, Section 15

<sup>269</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, Located at <https://www.legislation.tas.gov.au/view/html/asmade/act-2019-007>, accessed 23/08/2019, Section 16

<sup>270</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, Located at <https://www.legislation.tas.gov.au/view/html/asmade/act-2019-007>, accessed 23/08/2019 Section 17

<sup>271</sup> <sup>271</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, Located at <https://www.legislation.tas.gov.au/view/html/asmade/act-2019-007>, accessed 23/08/2019, Section 21

<sup>272</sup> Ibid

<sup>273</sup> Ibid

<sup>274</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, Located at <https://www.legislation.tas.gov.au/view/html/asmade/act-2019-007>, accessed 23/08/2019, Section 22

<sup>275</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, Located at <https://www.legislation.tas.gov.au/view/html/asmade/act-2019-007>, accessed 23/08/2019, Section 21

commitment to de-gendering the law in virtually all respects, including stating that any reference to the mother of a child means the person regardless of gender who carried the child in their reproductive tract and gave birth to them<sup>276</sup>.

In order to make an application under section 28B before the 1999 act was amended a person was required to use a 'Statutory Declaration Application for Registration of Change of Sex' form, which was not available online but was available from the registry office upon request<sup>277</sup>. As of August 23 2019 the website has not been updated to reflect the changes in the legislation, however a banner on the website states that new forms etc will be available by the 5<sup>th</sup> of September 2019<sup>278</sup>.

There does seem to have been some level of negative community response to the 2019 Act, although this may only be indicative of feelings among those already disposed to post in news article comment sections<sup>279</sup>. These negative responses do not appear to be from the trans or intersex communities, instead from those who believe that sex and gender are immutable and a fundamental characteristic of a person<sup>280</sup>.

## Victoria

The relevant statute in Victoria is the Births, Deaths and Marriages Registration Act 1996<sup>281</sup>. Section 30A<sup>282</sup> allows a person to apply for an amendment to the registry if their birth is

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<sup>276</sup> Ibid

<sup>277</sup> Tasmanian Government, Births, Deaths and Marriages, Change of sex, Located at 23/08/2019, Located at <https://www.justice.tas.gov.au/bdm/gender-registration>, accessed 23/08/2019

<sup>278</sup> Ibid

<sup>279</sup> "There are only two genders – male and female..." An Analysis of Online Responses to Tasmania Removing 'Gender' from Birth Certificates', Richardson-Self, L, (2020) 1 International Journal of Gender, Sexuality and Law 295

<sup>280</sup> "There are only two genders – male and female..." An Analysis of Online Responses to Tasmania Removing 'Gender' from Birth Certificates', Richardson-Self, L, (2020) 1 International Journal of Gender, Sexuality and Law 295, page 313

<sup>281</sup> Births, Deaths and Marriages Registration Act 1996 located at [http://www.austlii.edu.au/au/legis/vic/consol\\_act/bdamra1996383/](http://www.austlii.edu.au/au/legis/vic/consol_act/bdamra1996383/), accessed 23/08/2019

<sup>282</sup> Births, Deaths and Marriages Registration Act 1996, Located at [http://www.austlii.edu.au/au/legis/vic/consol\\_act/bdamra1996383/](http://www.austlii.edu.au/au/legis/vic/consol_act/bdamra1996383/), accessed 23/08/2019, Section 30A

registered in Victoria and they have undergone sexual reassignment surgery, section 30C also requires that the applicant be unmarried<sup>283</sup>. Section 30B requires that the application be accompanied by statutory declarations from two doctors or other medical practitioners to confirm that the applicant has undergone sexual reassignment surgery<sup>284</sup>. A new birth certificate may be issued under section 30D to reflect the alteration<sup>285</sup>. A similar procedure exists under section 30E for residents of Victoria whose birth is registered elsewhere to receive a document acknowledging their name and sex<sup>286</sup>.

A standard form for applications under section 30 is available online and requires a fee of 76 dollars (Australian)<sup>287</sup>.

In 2016 the Births, Deaths and Marriages Registration Amendment Bill 2016<sup>288</sup> was introduced, which would have altered the requirements to alter ones birth certificate in such a way that the requirements would be that a person be over the age of 18, that they have not changed their registered gender in the last 12 months and that they produce a supporting statement from someone who has known them for at least 12 months<sup>289</sup>. However the bill was not successfully passed by the legislature<sup>290</sup>.

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<sup>283</sup> Births, Deaths and Marriages Registration Act 1996, Located at [http://www.austlii.edu.au/au/legis/vic/consol\\_act/bdamra1996383/](http://www.austlii.edu.au/au/legis/vic/consol_act/bdamra1996383/), accessed 23/08/2019, Section 30C

<sup>284</sup> Births, Deaths and Marriages Registration Act 1996, Located at [http://www.austlii.edu.au/au/legis/vic/consol\\_act/bdamra1996383/](http://www.austlii.edu.au/au/legis/vic/consol_act/bdamra1996383/), accessed 23/08/2019, Section 30B

<sup>285</sup> Births, Deaths and Marriages Registration Act 1996, Located at [http://www.austlii.edu.au/au/legis/vic/consol\\_act/bdamra1996383/](http://www.austlii.edu.au/au/legis/vic/consol_act/bdamra1996383/), accessed 23/08/2019, Section 30D

<sup>286</sup> Births, Deaths and Marriages Registration Act 1996, Located at [http://www.austlii.edu.au/au/legis/vic/consol\\_act/bdamra1996383/](http://www.austlii.edu.au/au/legis/vic/consol_act/bdamra1996383/), accessed 23/08/2019, Section 30E

<sup>287</sup> Births Deaths and Marriages Victoria, Changes and Corrections, Change your recorded sex, Located at <https://www.bdm.vic.gov.au/changes-and-corrections/change-your-recorded-sex>, accessed 23/08/2019

<sup>288</sup> Births Deaths and Marriages Registration Amendment Bill 2016, Located at, [www.legislation.vic.gov.au/domino/Web\\_Notes/LDMS/PubPDocs\\_Arch.nsf/5da7442d8f61e92bca256de50013d008/ca257cca00177a46ca25801300117077/\\$FILE/581166bi1.pdf#targetText=30%20Page%2015%20Part%202,the%20name%20of%20the%20person.](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/ca257cca00177a46ca25801300117077/$FILE/581166bi1.pdf#targetText=30%20Page%2015%20Part%202,the%20name%20of%20the%20person.,), accessed 23/08/2019

<sup>289</sup> Births Deaths and Marriages Registration Amendment Bill 2016, Located at, [www.legislation.vic.gov.au/domino/Web\\_Notes/LDMS/PubPDocs\\_Arch.nsf/5da7442d8f61e92bca256de50013d008/ca257cca00177a46ca25801300117077/\\$FILE/581166bi1.pdf#targetText=30%20Page%2015%20Part%202,the%20name%20of%20the%20person.](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/ca257cca00177a46ca25801300117077/$FILE/581166bi1.pdf#targetText=30%20Page%2015%20Part%202,the%20name%20of%20the%20person.), accessed 23/08/2019, Section 8

<sup>290</sup> Victorian MPs to debate bill to let transgender people change birth certificate without surgery, Josh Taylor, The Guardian, 11/08/2019, Located at <https://www.theguardian.com/australia-news/2019/aug/11/victorian-mps-to-debate-bill-to-let-transgender-people-change-birth-certificate-without-surgery>, accessed 23/08/2019

As of August 2019 the Births, Deaths and Marriages Registration Amendment Bill 2019 is under consideration, which if passed will introduce measures similar to the 2016 bill<sup>291</sup>.

## Western Australia

In Western Australia the alteration of birth certificates and the registry is governed by the Gender Reassignment Act 2000<sup>292</sup>. Under sections 14 and 15 of that Act a person who has “undergone a reassignment procedure” may make an application to the gender reassignment board for a recognition certificate<sup>293</sup>. In order to make an application a person’s birth must have been registered in Western Australia, or they must have been resident in Western Australia for 12 months or more, or must have undergone their reassignment procedure in Western Australia<sup>294</sup>. The applicant must also believe that the gender they are applying to be reassigned to is their true gender, have “adopted the lifestyle” and have “the gender characteristics of a person of the gender to which the person has been reassigned”<sup>295</sup>. The applicant must also produce evidence that they have received counselling in relation to their gender identity<sup>296</sup>. Once a recognition certificate has been granted the registrar should amend the register accordingly if the persons birth was registered in Western Australia<sup>297</sup>. The certificate itself is considered to be evidence that a person is of the sex stated on it and that they have undergone sexual reassignment surgery<sup>298</sup>. A recognition certificate may be cancelled if it is discovered to have been obtained through fraud<sup>299</sup>. Once the register has

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<sup>291</sup> Births, Deaths and Marriages Registration Amendment Bill 2019, Located at [www.legislation.vic.gov.au/domino/Web\\_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cb0ca256da400837f6b/F667B734DE4F601BCA25841D000E43C1/\\$FILE/591082b11.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cb0ca256da400837f6b/F667B734DE4F601BCA25841D000E43C1/$FILE/591082b11.pdf), accessed 23/08/2019

<sup>292</sup> Gender Reassignment Act 2000, Located at [www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol\\_act/gra2000200/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/gra2000200/), accessed 23/08/2019

<sup>293</sup> Gender Reassignment Act 2000, Located at [www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol\\_act/gra2000200/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/gra2000200/), accessed 23/08/2019, Sections 14-15

<sup>294</sup> Gender Reassignment Act 2000, Located at [www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol\\_act/gra2000200/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/gra2000200/), accessed 23/08/2019, Section 15

<sup>295</sup> Gender Reassignment Act 2000, Located at [www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol\\_act/gra2000200/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/gra2000200/), accessed 23/08/2019, Section 15 (b) (ii)

<sup>296</sup> Gender Reassignment Act 2000, Located at [www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol\\_act/gra2000200/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/gra2000200/), accessed 23/08/2019, Section 15 (b) (iii)

<sup>297</sup> Gender Reassignment Act 2000, Located at [www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol\\_act/gra2000200/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/gra2000200/), accessed 23/08/2019, Section 17

<sup>298</sup> Gender Reassignment Act 2000, Located at [www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol\\_act/gra2000200/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/gra2000200/), accessed 23/08/2019, Section 16

<sup>299</sup> Gender Reassignment Act 2000, Located at [www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol\\_act/gra2000200/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/gra2000200/), accessed 23/08/2019, Section 19

been altered a new birth certificate reflecting the sex on the register following alteration can be issued, it must not have any indication that it has been amended<sup>300</sup>. The Act originally contained a provision that required that an applicant be unmarried<sup>301</sup>, this was removed by the Gender Reassignment Amendment Act 2019<sup>302</sup>.

The forms to apply for a recognition certificate are available online and require an applicant to pay a fee of 50 dollars (Australian)<sup>303</sup>.

#### Birth certificates Summary:

As can be seen from the descriptions above, none of the states and territories approach altering birth certificates in the same way. Every state or territory differs from the others in at least one way. There are however trends and commonalities. For example every state or territory requires some form of evidence, be that a statutory declaration to confirm identity, or, most often, declarations or letter from doctors. While there are no other features which are shared by every jurisdiction, there are characteristics shared by most jurisdictions.

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<sup>300</sup> Gender Reassignment Act 2000, Located at [www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol\\_act/gra2000200/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/gra2000200/), accessed 23/08/2019, Section 18

<sup>301</sup> Gender Reassignment Act 2000, Original Act as passed, Located at, [https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc\\_4921.pdf/\\$FILE/Gender%20Reassignment%20Act%202000%20-%20%20%5B00-00-03%5D.pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_4921.pdf/$FILE/Gender%20Reassignment%20Act%202000%20-%20%20%5B00-00-03%5D.pdf?OpenElement), accessed 23/08/2019, Section 15(3)

<sup>302</sup> Gender Reassignment Amendment Act 2019, Located at [https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc\\_41748.pdf/\\$FILE/Gender%20Reassignment%20Amendment%20Act%202019%20-%20%20%5B00-00-01%5D.pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_41748.pdf/$FILE/Gender%20Reassignment%20Amendment%20Act%202019%20-%20%20%5B00-00-01%5D.pdf?OpenElement), accessed 23/08/2019

<sup>303</sup> Department of Justice, Births, Deaths and Marriages, Gender Reassignment, Government of Western Australia, Located at [https://bdm.justice.wa.gov.au/G/gender\\_reassignment.aspx?uid=7219-6282-8371-6256](https://bdm.justice.wa.gov.au/G/gender_reassignment.aspx?uid=7219-6282-8371-6256), accessed 23/08/2019



Two out of eight of the jurisdictions require the applicant to be unmarried and to have had surgery of some description. Three out of eight of the jurisdictions also require evidence from multiple medical professionals.

Six out of eight of the jurisdictions require an application to the registrar to alter the registry, have a standard form for the application and require the new birth certificate to contain no evidence of alteration.

Every jurisdiction also charges a fee for altering a birth certificate. This may pose a problem, as these amendments are, in every jurisdiction, linked to a person's legal status. Once a birth certificate is amended that person is legally of that sex. This means that a person is essentially unable to obtain this legal status unless they can afford to pay this fee. While this fee may be necessary to cover genuine costs of the system, such as paying for the existence of gender recognition panels or other elements of the system. However it may cause concern that a percentage of the population will be unable to pay for their correct legal status to be recognised. Because a person whose gender matches their gender assigned at birth has no need to pay such a fee, this creates a situation where trans people with binary genders and cisgender people are both entitled to recognition under the law, but the transgender person must pay. This may be an example of indirect discrimination, as there is a universal entitlement that only members of a minority group must pay for, although it may be justified, this may also be a cause for concern.

#### Case law:

In addition to the relevant statutes in each case there is relevant case law which must also be considered.

There is a fair amount of case law on gender recognition in Australia, particularly as it relates to transsexuals. While an exploration of this history would no doubt be interesting, this has been done in other publications, so this section will be fairly brief, mentioning only a few key cases.

Up until recently the prevailing case law was based very much on the notion that surgery was required, but that someone who had had surgery would be considered to be the corresponding sex. This includes situations such as *R v Harris*<sup>304</sup> where Lee Harris was found to be a woman under the law and thus not liable for procuring “another” male person to commit an act of indecency. Key to the reasoning in this case was the idea of bringing one’s psychological gender and physical characteristics into “harmony”. It was concluded that one’s chromosomes or the idea of an unchangeable biological sex at birth should not be decisive, rather, a person’s gender should be legally recognised once there is sufficient change that there is “harmony” between one’s gender and physical appearance<sup>305</sup>. This is interesting given the particular facts of the case, as arguably there was not full “harmony” between physical and mental, as Lee Harris was unable to have vaginal intercourse due to a closing up of her vagina following surgery<sup>306</sup>. This complication was deemed irrelevant by the court as it was “temporary” despite the fact that this condition would not fix itself and would require surgery to remedy<sup>307</sup>. The case has been criticised not only as it seems strange that the capacity for heterosexual sex be the deciding factor in the criminal law in general, but also particularly in this case as the incident in question was one of oral sex with a cisgender man, which did not involve any vaginas of any kind<sup>308</sup>.

This state of affairs, with a focus on physical sex, and specifically the ability to participate in specific heterosexual sex acts. Continued with the case of *Secretary, Department of Social Security v. SRA*<sup>309</sup>. This case concerned a pre-operative trans woman who wished to be recognised as female to qualify for a wife’s pension. Despite qualifying for surgery, she had

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<sup>304</sup> *R v Harris and McGuiness* [1989] 17 NSWLR 158

<sup>305</sup> *R v Harris and McGuiness* [1989] 17 NSWLR 158 at 193

<sup>306</sup> *R v Harris and McGuiness* [1989] 17 NSWLR 158 at 173

<sup>307</sup> *R v Harris and McGuiness* [1989] 17 NSWLR 158 at 193

<sup>308</sup> From Functionality to Aesthetics: the Architecture of Transgender Jurisprudence, Andrew N Sharpe LLB (Hons), [2001] MurUEJL 4, Paragraph 8, Located at <http://www.austlii.edu.au/au/journals/MurUEJL/2001/4.html#t20>, accessed 01/09/2019

<sup>309</sup> *Secretary, Department of Social Security v SRA* [1993] FCA 573

decided not to undergo it for financial reasons<sup>310</sup>. Under the precedent set in Harris the prime factor to be considered would have to have been physical sex, particularly with regard to the ability to engage in penetrative heterosexual intercourse. However it was argued that this case should be distinguished from Harris as Harris was a criminal case, and that pensions do not require the same understanding of sex as criminal law. This argument was, however, rejected. The court stated that to be recognised as their “new” gender a transgender person must have “harmonized their social and anatomical sex”, and that without that harmonization a person could not be considered to be male or female<sup>311</sup>. Lockhart J justifies the requirement for surgery despite that the individual in this case was not able to afford it by stating:

“Nevertheless the interests of society and the individual must be balanced in the determination of the ordinary meaning of the words with which this case is concerned and the application of the facts to those meanings. The requirement of reassignment surgery also has the benefit of society acknowledging that an irreversible medical decision has been made, confirming the person's psychological attitude.”<sup>312</sup>

He then goes on to state that sex is not solely a matter of chromosomes but is partly psychological and social<sup>313</sup> and that the terms man or woman refer to someone who has harmonized their physical sex with their mental one. He acknowledges that such a person cannot reproduce, but they are functionally a member of their new sex, as they can have intercourse, and that they appear to be physically, as they have acquired the secondary traits of their sex. He states that “A transsexual who has undergone successful sex reassignment has an apparently normal female anatomy and she will feel convinced that she belongs to her new sex and that she has achieved an integrated identity by adopting the physical characteristics of the female to her psychological nature.”<sup>314</sup>

This case has been referred to as the start of a move away from requiring a person to have the physical “function” of their “acquired sex” and towards the aesthetics of their new sex<sup>315</sup>, as while function is mentioned it is clear that that is not a key requirement, particularly has

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<sup>310</sup> Secretary, Department of Social Security v SRA [1993] FCA 573, at para 2

<sup>311</sup> Secretary, Department of Social Security v SRA [1993] FCA 573 at para 98

<sup>312</sup> Secretary, Department of Social Security v SRA [1993] FCA 573 at para 98

<sup>313</sup> Secretary, Department of Social Security v SRA [1993] FCA 573 at para 94

<sup>314</sup> Secretary, Department of Social Security v SRA [1993] FCA 573 at para 95

<sup>315</sup> From Functionality to Aesthetics: The Architecture of Transgender Jurisprudence, Andrew N Sharpe LLB (Hons), [2001] MurUEJL 4, Paragraph 15, Located at <http://www.austlii.edu.au/au/journals/MurUEJL/2001/4.html#t20>, accessed 01/09/2019

Lockheart J states that it is not possible for a female to male transgender person to acquire such “functionality” but this does not preclude them from recognition as a man<sup>316</sup>. While it will be discussed in more detail in the concluding chapters of this thesis it is interesting to note this at this stage, particularly as Lockheart J discusses this in terms of balancing the needs of the individual and those of society, and states that societies interest is in ensuring that the words “male and female” persist in their meaning, which he then goes on to discuss in terms of “feeling convinced” that a person belongs to their new sex by adopting certain physical characteristics. As the purpose of recognition is key to any discussion of its function, the reasoning here is particularly noteworthy as it implies that the purpose of recognition is to apply labels based on physical appearances, as no change in label can be made with only a mental difference, the physical aspect being the deciding factor.

It is also interesting to note the Lockheart J adds that there is a benefit from society in withholding recognition unless an irreversible medical decision has been made. This seems to indicate a view that society has an interest in withholding recognition unless it is irreversible, perhaps also requiring a person to demonstrate their authenticity.

The most recent case on binary gender recognition from Australia is *AB v Western Australia*<sup>317</sup>. This case concerned two FTM (Female to Male) transsexuals who sought to be recognised as men. They had applied to the gender recognition panel of western Australia as per the Gender Reassignment Act 2000<sup>318</sup>, but their application had been declined as they had not received genital surgery. Thus the case hinged on whether or not the act permitted a pre-operative trans person to be recognised, which relied on the wording in section 15 (b) which requires that:

“(b) The Board is satisfied that the person—

(i) believes that his or her true gender is the gender to which the person has been reassigned;  
and

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<sup>316</sup> Secretary, Department of Social Security v SRA [1993] FCA 573 at para 95

<sup>317</sup> AB v Western Australia [2011] HCA 42

<sup>318</sup> Gender Reassignment Act 2000 located at [http://www.austlii.edu.au/au/legis/wa/consol\\_act/gra2000200/](http://www.austlii.edu.au/au/legis/wa/consol_act/gra2000200/), accessed 03/09/2019

(ii) has adopted the lifestyle and has the gender characteristics of a person of the gender to which the person has been reassigned; and

(iii) has received proper counselling in relation to his or her gender identity.”<sup>319</sup>

In particular the wording in 15(b)(ii), requiring a person to have “the gender characteristics” of the gender they wish to be recognised as were at issue. The gender recognition board stated that having a female reproductive system was inconsistent with being male and with being identified as such, and that there would be adverse social consequences if it were possible to be recognised as male while retaining the ability to bear children<sup>320</sup>. This argument however did not find favour with the high court which instead followed the reasoning that because section 3 of the act defines gender characteristics as “the physical characteristics by virtue of which a person is identified as male or female”, and that a person is primarily identified by their external characteristics, that section 15(b)(ii) is only concerned with external characteristics. It was argued that if the act wished to refer to all characteristics, then it would have referred to the characteristics of the sex that a person “is or will be” rather than the sexual characteristics by which a person is identified as a member of a sex<sup>321</sup>.

Finally the most recent case in this area, and of particular importance in the cases of intersex people and those with non-binary genders is the case of *NSW Registrar of Births, Deaths and Marriages v Norrie*<sup>322</sup>. Norrie May-Welby was born in Scotland with “ambiguous genitalia” and underwent a surgical procedure in 1989 to rectify this. It did not, in her view, resolve her “ambiguous” status, and in 2009 applied to be recognised as “non-specific” under the Births, Deaths and Marriages Registration Act 1995<sup>323</sup>. The registrar submitted that this application should not be granted, as the act assumed the existence of only two sexes, which are referred to as being “opposite” each other<sup>324</sup>.

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<sup>319</sup> Gender Reassignment Act 2000, Section 15 (b), Located at [http://www.austlii.edu.au/au/legis/wa/consol\\_act/gra2000200/](http://www.austlii.edu.au/au/legis/wa/consol_act/gra2000200/), accessed 03/09/2019

<sup>320</sup> *AB v Western Australia* [2011] HCA 42 at Para 12

<sup>321</sup> *AB v Western Australia* [2011] HCA 42 at Para 22

<sup>322</sup> *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11

<sup>323</sup> Births, Deaths and Marriages Registration Act 1995 located at [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/bdamra1995383/](http://www.austlii.edu.au/au/legis/nsw/consol_act/bdamra1995383/)

<sup>324</sup> *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at para 28

The court rejected this argument, pointing out that the act itself recognises that a person's sex may be ambiguous, in its definition of sex affirmation procedure<sup>325</sup>. The court also pointed out the mention in *AB v Western Australia* that "the sex of a person is not ... in every case unequivocally male or female."<sup>326</sup> The court also stated that the act ought not to be interpreted in such a way that it would force a person who is neither male nor female to be recognised as such erroneously<sup>327</sup>. The court also responded to the argument presented by the registrar that to permit people to be recognised as male or female would cause confusion in other legal areas and leave people in a "legal no-man's land" by stating that this issue only really arose in regards to marriage, and that the argument ought not to be considered as it is merely an argument from inconvenience<sup>328</sup>.

This judgement could represent an "opening up" of sex categories to expand beyond the binary, and following this case states and territories did begin to allow registration as non-binary or intersex, particularly following the introduction of marriage equality in 2018<sup>329</sup>. However this "opening up" of sex categories may have been due more to the Australian government issuing guidelines on sex and gender in 2013<sup>330</sup>, or a combination of these events. However following the judgement Joanna Davidson wrote in the journal of the New South Wales Bar Association that "The decision removes the prospect that the potential categories of registration of sex under the Act are indeterminate. Registrable classifications of sex under Pt 5A are confined to male, female and non-specific."<sup>331</sup>

This demonstrates an alternate perspective, that rather than opening up the scope of legally recognised gender, such cases "lock down" the available options to male, female and "non-specific" rather than allowing scope for our understandings of sex or gender to expand beyond these categories. A similar perspective can be seen in the concerns of intersex groups, that such classification may reinforce the gender/sex binary by creating a definitive "other"

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<sup>325</sup> NSW Registrar of Births, Deaths and Marriages v Norrie [2014] HCA 11 at para 1

<sup>326</sup> NSW Registrar of Births, Deaths and Marriages v Norrie [2014] HCA 11 at para 37

<sup>327</sup> NSW Registrar of Births, Deaths and Marriages v Norrie [2014] HCA 11 at para 32

<sup>328</sup> NSW Registrar of Births, Deaths and Marriages v Norrie [2014] HCA 11 At paras 43 and 44

<sup>329</sup> Marriage Amendment (Definition and Religious Freedoms) Act 2017

<https://www.legislation.gov.au/Details/C2018C00423> accessed 06/08/2019

<sup>330</sup> Australian Government Guidelines on the Recognition of Sex and Gender, Australian Government, July 2013, Updated November 2015, Paragraph 2, Located at

<https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf> accessed 11/08/2019

<sup>331</sup> "Non-specific gender" Davidson, Joanna [2014] NSWBarAssocNews 24, page 12.

category rather than acknowledging the flawed nature of a strict male/female distinction<sup>332</sup>, as well as concerns that such classification may undermine the efforts of transgender people who identify with a binary gender<sup>333</sup>.

## Prisons:

One of the main areas where gender identification can have a prominent role is in prisons. Australia is no exception to this. As with birth certificates, how people are housed in prisons based on their gender or sex is a matter for each of the states or territories to decide, and, as is also the case with recognition on birth certificates, no two jurisdictions have taken the same approach. As such the approach taken by each jurisdiction will be discussed in turn, followed by trends in these policies.

## Australian Capital Territory:

The capital territory has one of the longer and more detailed policies on this matter. The policy requires that a prisoner's self-identified identity be recorded when they are received by a correctional centre<sup>334</sup>. While the decision as to how a transgender or intersex person is to be made by the superintendent, there are guidelines as to what factors should be considered. These are: the self-identified identity of the prisoner, the nature of their offence and criminal

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<sup>332</sup> Intersex Human Rights Australia, On *Norrie v NSW Registrar of Births, Deaths and Marriages*, Gina Wilson, 22/06/2013, Located at <https://ihra.org.au/22681/norrie-v-nsw-registrar-of-births-deaths-and-marriages/>, accessed 26/08/2019

<sup>333</sup> "No Man's Land": Non-binary Sex Identification in Australian Law and Policy", Bennett, Theodore, (2014) 37 University of New South Wales Law Journal 847

<sup>334</sup> Australian Capital Territory Corrections Management (Reception and Management of Transgender Prisoners) Policy 2007\* Notifiable instrument NI2007-469 located at <http://www.legislation.act.gov.au/ni/2007-469/20071219-35655/pdf/2007-469.pdf> at 2.5

history, their correctional history and any risks to the safety of the prisoner or to others<sup>335</sup>.

The policy states that “Ideally, the prisoner should be placed in single cell accommodation, or with other prisoners who self-identify as transgender/intersex, and given access to a private toilet and shower facilities”<sup>336</sup> and that, unless there is some concern for safety, a transgender or intersex person should be housed in a facility appropriate to their self-identified gender<sup>337</sup>.

## New South Wales

In New South Wales the policy divides those to whom it applies into three groups: recognised transgender, transgender and intersex. Recognised transgender people are those who have sought formal recognition on a birth certificate or other document. Recognised transgender people are to be housed according to the sex recognised on their documentation<sup>338</sup>.

Transgender people who do not fall into the category of recognised transgender need only express their self-identified gender and should be treated as a member of that gender<sup>339</sup>.

Similarly intersex people are to be treated as members of the gender they identify as. While a recognised transgender person is always to be treated as the sex identified on their documentation, intersex and transgender people who do not fall into this category are treated slightly differently. While they are, by default, to be treated as members of the gender to which they identify, they can, if it is deemed more appropriate, be housed in a facility based on their biological sex. This decision is to be made based on the nature of a person’s offence,

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<sup>335</sup> Australian Capital Territory Corrections Management (Reception and Management of Transgender Prisoners) Policy 2007\* Notifiable instrument NI2007-469 located at <http://www.legislation.act.gov.au/ni/2007-469/20071219-35655/pdf/2007-469.pdf> at 3.1

<sup>336</sup> Australian Capital Territory Corrections Management (Reception and Management of Transgender Prisoners) Policy 2007\* Notifiable instrument NI2007-469 located at <http://www.legislation.act.gov.au/ni/2007-469/20071219-35655/pdf/2007-469.pdf> at 3.2

<sup>337</sup> Australian Capital Territory Corrections Management (Reception and Management of Transgender Prisoners) Policy 2007\* Notifiable instrument NI2007-469 located at <http://www.legislation.act.gov.au/ni/2007-469/20071219-35655/pdf/2007-469.pdf> at 3.3

<sup>338</sup> Corrective Services NSW Operations Procedures Manual Section 7.23 Management of Transgender and Intersex Inmates. Located at <http://www.correctiveservices.justice.nsw.gov.au/Documents/custodial-op-proc-manual/OPM%20Sec%207.23%20Management%20of%20Transgender%20and%20Intersex%20inmates%20v2.0.pdf> at 7.23.2 paragraph 1

<sup>339</sup> Corrective Services NSW Operations Procedures Manual Section 7.23 Management of Transgender and Intersex Inmates. Located at <http://www.correctiveservices.justice.nsw.gov.au/Documents/custodial-op-proc-manual/OPM%20Sec%207.23%20Management%20of%20Transgender%20and%20Intersex%20inmates%20v2.0.pdf> at 7.23.2 paragraph 2



their custodial history and any relevant safety concerns<sup>340</sup>. It is also worth noting that the policy requires that if a transgender or intersex person identifies in such a way that they should, under the policy, be housed in a women's prison a member of staff from the women's prison must be present at their assessment. No such requirement exists for those who are being assessed for housing in a men's prison.

## Northern Territory

The Northern Territory does not currently appear to have a policy on the housing of transgender or intersex people in prison.

## Queensland

Queensland does not currently have a specific policy on intersex or transgender people in prison<sup>341</sup>. However a 2006 Anti-discrimination Commission report recommended that an approach based on self-identification be adopted<sup>342</sup>.

In its response to the report the Department of Corrective Services stated that:

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<sup>340</sup> Corrective Services NSW Operations Procedures Manual Section 7.23 Management of Transgender and Intersex Inmates. Located at <http://www.correctiveservices.justice.nsw.gov.au/Documents/custodial-op-proc-manual/OPM%20Sec%207.23%20Management%20of%20Transgender%20and%20Intersex%20inmates%20v2.0.pdf> at 7.23.2 paragraph 5

<sup>341</sup> Women in prison report 2006 10.5 Transgender female prisoners Anti Discrimination Commission Queensland, Located at <https://www.adcq.qld.gov.au/human-rights/women-in-prison-report/women-in-prison-contents/groups-with-special-needs/transgender> located at <https://www.adcq.qld.gov.au/human-rights/women-in-prison-report/women-in-prison-contents/groups-with-special-needs/transgender>, accessed 17/01/2021, at paragraph 3

<sup>342</sup> Queensland Women in prison report 2006 10.5 Transgender female prisoners, Anti Discrimination Commission Queensland, Located at <https://www.adcq.qld.gov.au/human-rights/women-in-prison-report/women-in-prison-contents/groups-with-special-needs/transgender>, accessed 17/01/2021, at paragraph 5

“The Department’s approach to the placement and accommodation of transgender prisoners is to deal with each matter on a case by case basis and weight up the various considerations which may include such factors as: • the risk the offender may pose to the safety and security of the placement facility; • whether the offender has been convicted of a sexual offence, involving a child, in Queensland or elsewhere; • the risk to the offender or to other offenders at the placement facility; and the offender’s preference for accommodation in a male or female facility.”<sup>343</sup>

It is worth noting that this approach referred to in the response to the report does not offer any order in which the relevant factors should be considered, unlike many jurisdictions with policies which consider similar factors, but also say that by default a person should be housed by their self-identified gender.

## South Australia

South Australia does, according to at least one article available online, have a policy. It relies on a person’s biological sex and the sex recorded on official document<sup>344</sup>, However I have been unable to locate the text of the policy. It is worth noting that this article is over 16 years old.

## Tasmania

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<sup>343</sup> Department of Corrective Services response to The Anti-Discrimination Commission Queensland Women in Prison Report march 2006, located at [www.correctiveservices.qld.gov.au/Publications/Corporate\\_Publications/Reviews\\_and\\_Reports/ADCQ/ResponseFINALlowres.pdf](http://www.correctiveservices.qld.gov.au/Publications/Corporate_Publications/Reviews_and_Reports/ADCQ/ResponseFINALlowres.pdf) at page 56 paragraph 2

<sup>344</sup> Trends and Issues in crime and criminal justice, Transgender Inmates, Jake Blight, Australian Institute of Criminology, September 2000 No168, Located at [aic.gov.au/media\\_library/publications/tandi\\_pdf/tandi168.pdf](http://aic.gov.au/media_library/publications/tandi_pdf/tandi168.pdf), accessed 17/01/2021 page 4 para 7

Tasmania has a policy on transgender prisoners. It is currently not available to the public<sup>345</sup>.

## Victoria

In Victoria prisoners are initially housed according to the gender on their warrant. If that person makes it known that they are transgender or intersex then the prison medical officer must be informed immediately<sup>346</sup>. As soon as possible after the arrival of such a prisoner a Sentence Management panel must be convened. The placement of the transgender or intersex prisoner will be determined by the panel which will consider the following factors: confirmation of the prisoners gender in consultation with the prisoners general practitioner when possible, the safety and well-being of the prisoner, the prisoner's preference as to where they are to be housed and the safety and welfare of other prisoners<sup>347</sup>. The safety of the prisoner and other prisoners should be considered as a priority<sup>348</sup>.

## Western Australia

Western Australia does not have a policy that specifically mentions transgender or intersex people. It does however have a general policy which states that the gender of a prisoner for the purpose of placement is to be determined by their warrant or whatever instrument authorised their imprisonment<sup>349</sup>.

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<sup>345</sup> Department of Justice prison service, Policies and procedures, Directors Standing Orders, Tasmanian Government, Located at [www.justice.tas.gov.au/prisonservice/Policies\\_and\\_Procedures](http://www.justice.tas.gov.au/prisonservice/Policies_and_Procedures)

<sup>346</sup> Commissioner's Requirement – Management of Prisoners with Intersex Conditions or Transsexualism march 2016 CR Number 2.4.1, at 6.2.1

<sup>347</sup> Commissioner's Requirement – Management of Prisoners with Intersex Conditions or Transsexualism march 2016 CR Number 2.4.1 at 6.3.6

<sup>348</sup> Commissioner's Requirement – Management of Prisoners with Intersex Conditions or Transsexualism march 2016 CR Number 2.4.1 at 6.3.7

<sup>349</sup> Policy Directive 85 Prisoner Reception – procedures, Government of Western Australia Department of corrective services, Located at [http://www.correctiveservices.wa.gov.au/\\_files/prisons/adult-custodial-rules/policy-directives/pd-85-appendix-procedures.pdf](http://www.correctiveservices.wa.gov.au/_files/prisons/adult-custodial-rules/policy-directives/pd-85-appendix-procedures.pdf) at 3.2

## Prisons Summary:

There are a number of trends that can be observed from these policies. Most policies allow for a consideration of multiple factors, with safety and the self-identification of the individual in question being the most commonly emphasised factors. While a number of policies recognise the existence of intersex people and those with non-binary genders, none of the policies in Australia have any specific measures for intersex people or those with non-binary genders, they are instead mentioned as a part of policies relating more broadly to transgender people.

It should be noted that the federal system, while it makes legal research more time consuming may have advantages. The main beneficial feature of a federal system is that it allows the states and territories to function as “laboratories of democracy”. Having many different policies provides a unique opportunity to observe how variations in law can cause different outcomes, allowing us to evaluate which policy paths are the most productive. However, in Australia, particularly with regards to prisons, some problems exist which serve to minimise this beneficial feature of a federal system. Firstly some jurisdictions do not have their policies available to the public. While there may be reasons for this such as security concerns particularly where prisons are concerned, it does make any research regarding those policies significantly more difficult. Secondly, in order to make evaluations about the efficacy of these policies it would be necessary to collect and make available data about the outcomes of these policies. Such data does not seem to be available to the public in most cases, and would likely take an effort beyond the scope of this thesis to obtain.

It is worth noting that every policy that I have located in Australia allows for judgements to be made on a case by case basis. This allows for flexibility on individual cases, but does open the system up to accusations of inconsistency. More data would be needed to say that that is the case in these cases, but it is a weakness often encountered by systems that rely heavily on

case by case judgements. It is also worth noting that some jurisdictions have attempted to retain the flexibility of a case by case system while also guiding outcomes by either having a default state, deviation from which must be justified, or by making clear the importance of the various factors to be considered.

## Marriage:

Marriage in Australia is governed by the marriage act 1961<sup>350</sup>. Section 5 of the act defines marriage as:

“The union of a man and a woman to the exclusion of all others, voluntarily entered into for life.”

This wording was added by the Marriage Amendment Act 2004<sup>351</sup> and was intended to prevent the possibility of same-sex marriage<sup>352</sup>.

The earliest case on the issue of marriage and intersex people in Australia was *In the marriage of C and D (falsely called C)*<sup>353</sup>. This case concerned a marriage in which the husband “had been diagnosed as a hermaphrodite”. This case used the definition of marriage found in the British case of *Hyde v Hyde*<sup>354</sup> that marriage is “the voluntary union for life of one man and one woman, to the exclusion of all others”<sup>355</sup> and that, as the husband in the case

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<sup>350</sup> Marriage Act 1961

<sup>351</sup> The Marriage Amendment Act 2004, Schedule 1 (1)

<sup>352</sup> House of representatives, explanatory memorandum Marriage Amendment Bill 2004, The parliament of the commonwealth of Australia, Located at [http://www.austlii.edu.au/au/legis/cth/bill\\_em/mab2004175/memo1.html](http://www.austlii.edu.au/au/legis/cth/bill_em/mab2004175/memo1.html)

<sup>353</sup> *In the marriage of C and D (falsely called C)* (1979) 35 FLR 340

<sup>354</sup> *Hyde v Hyde and Woodmansee*. [L.R.] 1 P. & D. 130 (1886)

<sup>355</sup> *Hyde v Hyde and Woodmansee*. [L.R.] 1 P. & D. 130 (1886) at para 13

could not be considered a man, and was instead a mixture of male and female, a valid marriage could not have taken place<sup>356</sup>.

This would seem to suggest that, under this case law, an intersex person could not marry in Australia. However, the later case of *Re Kevin*<sup>357</sup> would address this issue in a different context and may shed light as to how a similar case to *C and D* would be decided today.

*Re Kevin* concerned a post-operative female to male transsexual who, having married a woman, sought a declaration of the validity of the marriage<sup>358</sup>. The court ultimately decided to follow the reasoning in *R v Harris*<sup>359</sup> and *Secretary, Department of Social Security v SRA*<sup>360</sup>, that a post-operative transsexual should be considered to be of the gender of their “reassignment”. But *Re Kevin* is particularly of note because of some of the other arguments made and the mentions of *in the marriage of C and D*.

One of the particularly interesting arguments made in that case was that transsexualism should be considered to be a form of intersex condition. The argument was specifically that an intersex condition is when a person’s physical state is “between” male and female in some way. The argument continues that because there is some data to suggest that the brain of a transsexual is more similar to their true gender than the one assigned at birth, that this can be considered a physical state which is in-between male and female, and should therefore be considered an intersex condition<sup>361</sup>. As such it was argued that this case should be considered to be more similar to *WvW*<sup>362</sup> than the *Corbett*<sup>363</sup> case that *C and D* was based on<sup>364</sup>. *WvW* concerned an intersex person, who had gender confirmation surgery and lived as a woman. In that case it was found that she should be considered female for the purposes of marriage<sup>365</sup>. Because the court found the approach in *WvW* to be more compelling than that of *Corbett*,

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<sup>356</sup> *In the marriage of C and D (falsely called C)* (1979) 35 FLR 340

<sup>357</sup> *Re Kevin* (validity of marriage of transsexual)[2003] FamCA 94

<sup>358</sup> *Re Kevin* (validity of marriage of transsexual)[2003] FamCA 94 paragraph 3

<sup>359</sup> *R v Harris and McGuiness* [1989] 17 NSWLR 158

<sup>360</sup> *Secretary, Department of Social Security v SRA* [1993] FCA 573

<sup>361</sup> *Re Kevin* (validity of marriage of transsexual)[2003] FamCA 94 paragraphs 183 - 186

<sup>362</sup> *W v W* (Physical inter-sex) [2001] Fam 111

<sup>363</sup> *Corbett v Corbett* (Otherwise Ashley) [1971] P. 8

<sup>364</sup> *Re Kevin* (validity of marriage of transsexual)[2003] FamCA 94 paragraph 291

<sup>365</sup> *W v W* (Physical inter-sex) [2001] Fam 111 At 147 para 1

partly due to new evidence on the nature of transsexualism, and partly due to *Corbett* seeming inconsistent with other Australian cases<sup>366</sup>, the court decided that *Kevin*, for the purposes of marriage, should be considered a man.

The court, because it found that Kevin's case was similar to an intersex person, also discussed “*In the marriage of C*”. The court stated that “*In the marriage of C*” was: “wrongly decided and should not be regarded as expressing the law in this country.”<sup>367</sup>

While it is possible to argue that this statement in *Re Kevin* is obiter dicta, and therefore non-binding, this may not be the case. Because one of the key points in *Re Kevin* was that the court regarded the case as being similar to an intersex case, due to the notion of “brain sex” it could be possible to argue that *Re Kevin* could in fact be regarded as a case about a type of intersex person, even if Kevin did not identify as such. It is also possible that it may not in fact matter if this statement in *Re Kevin* is strictly binding, as it may still be representative of the feelings of the judiciary about *In the marriage of C*. As such it may be that while *Re Kevin* may not be binding on the topic of intersex marriage, it may still be indicative of how such a case would be decided today.

It is also worth noting that Kevin was post-operative, and as such the decision in this case should only be interpreted as referring to those who have had some form of gender confirmation surgery<sup>368</sup>. However while previous courts have stated that the status of pre-operative transgender persons is a matter for parliament to decide, the court in *Re Kevin* pointed out that it seems inconsistent that parliament be required to act to establish the legal status of people based solely on if they have had surgery. The court also pointed out that, due to the notion of “brain sex” that it mentioned earlier in its judgement, if that is to be the decisive factor, as it was in this case, then requiring a person to have surgery to count as their true gender for the purposes of marriage seems strange, as their brain sex is the same regardless of if they have had surgery<sup>369</sup>.

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<sup>366</sup> *Re Kevin* (validity of marriage of transsexual)[2003] FamCA 94 paragraphs 291 and 374

<sup>367</sup> *Re Kevin* (validity of marriage of transsexual)[2003] FamCA 94 paragraphs 205 and 231

<sup>368</sup> *Re Kevin* (validity of marriage of transsexual)[2003] FamCA 94 paragraph 382

<sup>369</sup> *Re Kevin* (validity of marriage of transsexual)[2003] FamCA 94 paragraphs 382 to 384

Because the legal status of those with non-binary genders and intersex people was not clear when it comes to marriage, partly due to the lack of a case specifically on that matter which is more recent than *In the marriage of C*, Intersex advocacy groups advocated for the explicit inclusion of intersex people in a possible future marriage bill which would permit same-sex marriage<sup>370</sup>.

The issue of transgender and intersex people having their marriage rights denied or restricted was largely based on the fact that only heterosexual marriages were recognised, which caused difficulties when determining what the law should recognise a person's sex to be in those cases. However starting in 2016 the Australian government and legislature began to move towards expanding marriage to include homosexual unions<sup>371</sup>. This is relevant for the purposes of this thesis as certain implementations of this can allow for marriage to be opened to all couples, regardless of the genders or sexes of the participants, which can remove the issues caused when the law must attempt to sex or gender a person for the purposes of marriage.

In September 2016 the national government introduced the Plebiscite (Same-Sex Marriage) Bill 2016<sup>372</sup> which would allow for a plebiscite on the question of “Should the law be changed to allow same-sex couples to marry?”<sup>373</sup>. This was defeated in a vote on the 7<sup>th</sup> of November 2016<sup>374</sup>. Following this the government announced their intention to gather data on the wishes of the population regarding same-sex marriage using a survey through the Australian Bureau of Statistics, which would then inform subsequent legislation, rather than

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370 Marriage and people with intersex variations, a submission, Olli Australia, Located at [https://oii.org.au/31139/submission-marriage-amendment-2017/#d20Parts 4 and 6](https://oii.org.au/31139/submission-marriage-amendment-2017/#d20Parts%204%20and%206)

371 With the induction of the Plebiscite (Same-Sex Marriage) Bill 2016, Located at [https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r5728\\_first-reps/toc\\_pdf/16133b01.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r5728_first-reps/toc_pdf/16133b01.pdf;fileType=application%2Fpdf) accessed 05/08/2019

372 Ibid

373 Ibid

374 Bills and Legislation, Plebiscite (Same-Sex Marriage) Bill 2016, Parliamentary Business, Parliament of Australia, Located at [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r5728](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5728) accessed 05/08/2019



requiring a plebiscite<sup>375</sup>. This was implemented by an order from the treasurer, Scott, John Morrison, to the Australian Statistician, and by extension the Bureau of Statistics, under section 9(1)b of the Census and Statistics Act<sup>376</sup> which allows for a notice in writing requiring the statistician<sup>377</sup> to collect data for a specific purpose<sup>378</sup>. This notice was dated 9/08/2017<sup>379</sup>.

The survey was subject to two legal challenges in the High Court, one concerning the legitimacy of the funds for the survey under the Appropriation Act<sup>380</sup><sup>381</sup>, the other relating to matters under the Appropriation Act as well as a claim that the Statistics Direction was not authorized under the Statistics Act<sup>382</sup>. These cases were heard together on the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> of September 2017, with the Ruling issued on the 7<sup>th</sup><sup>383</sup> and the reasons being published on the 28<sup>th</sup><sup>384</sup>. The applications were dismissed in both cases, allowing the survey to proceed<sup>385</sup>. As the relevance of this case for this thesis is as a matter of historical context, rather than as precedent, a full analysis of the legal reasoning is beyond the scope of this thesis. Additional safeguards were introduced in an additional piece of legislation, which created specific offences of bribing a person regarding their response on the survey and of accepting such a

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<sup>375</sup> Same-Sex Marriage: Peter Dutton confirms push for a postal vote plebiscite, Matthew Knott, Amy Remeikis, The Sydney Morning Herald, 23/04/2016, Located at <https://www.smh.com.au/politics/federal/samesex-marriage-peter-dutton-confirms-push-for-a-postal-vote-plebiscite-20170323-gv4hl1m.html> accessed 05/08/2019

<sup>376</sup> Census and Statistics Act 1905, located at <https://unstats.un.org/unsd/dnss/docViewer.aspx?docID=1993>, accessed 05/08/2019

<sup>377</sup> An office defined by the Australian Bureau of Statistics Act 1975, Section 5 (2), located at <https://www.legislation.gov.au/Details/C2012C00137>, accessed 05/08/2019

<sup>378</sup> Census and Statistics Act 1905, Section 9 (1) (b) located at <https://unstats.un.org/unsd/dnss/docViewer.aspx?docID=1993>, accessed 05/08/2019

<sup>379</sup> Census and Statistics (statistical Information) Direction 2017, 09/08/2017, located at <https://web.archive.org/web/20170810014829/https://www.legislation.gov.au/Details/F2017L01006> accessed 05/08/2019

<sup>380</sup> Appropriation Act (No. 1) 2017-2018 No. 60, 2017, Section 10, located at <https://www.legislation.gov.au/Details/C2017A00060> accessed 06/08/2019

<sup>381</sup> Wilkie v The Commonwealth; Australian Marriage Equality Ltd v Cormann [2017] HCA 40, Located at [eresources.hcourt.gov.au/downloadPdf/2017/HCA/40](https://eresources.hcourt.gov.au/downloadPdf/2017/HCA/40), accessed 06/08/2019, paragraph 54

<sup>382</sup> Wilkie v The Commonwealth; Australian Marriage Equality Ltd v Cormann [2017] HCA 40, Located at [eresources.hcourt.gov.au/downloadPdf/2017/HCA/40](https://eresources.hcourt.gov.au/downloadPdf/2017/HCA/40), accessed 06/08/2019, Paragraph 51

<sup>383</sup> Report on the conduct of the Australian Marriage Law Postal Survey 2017, Australian Bureau of Statistics, Located at [https://www.abs.gov.au/ausstats/abs@.nsf/6630eff525d4cdc1ca25763e0075754f/7cbde85f96095fa4ca25822400162fc2/\\$FILE/700652\\_ABS\\_AMLPS\\_A4\\_Report\\_Conduct\\_0118\\_FA4.002.pdf/700652\\_ABS\\_AMLPS\\_A4\\_Report\\_Conduct\\_0118\\_FA4.pdf](https://www.abs.gov.au/ausstats/abs@.nsf/6630eff525d4cdc1ca25763e0075754f/7cbde85f96095fa4ca25822400162fc2/$FILE/700652_ABS_AMLPS_A4_Report_Conduct_0118_FA4.002.pdf/700652_ABS_AMLPS_A4_Report_Conduct_0118_FA4.pdf) accessed 05/08/2019. Page 4

<sup>384</sup> Wilkie v The Commonwealth; Australian Marriage Equality Ltd v Cormann [2017] HCA 40, page 1 of the PDF, Located at [eresources.hcourt.gov.au/downloadPdf/2017/HCA/40](https://eresources.hcourt.gov.au/downloadPdf/2017/HCA/40) accessed 06/08/2019

<sup>385</sup> Ibid

bribe<sup>386</sup>, as well a civil penalty for vilifying a person for their view regarding the survey<sup>387</sup> and introduced a number of other safeguards such as those relating to the production and retention of documents relating to the survey<sup>388</sup> and the actions of broadcasters regarding the survey<sup>389</sup>.

The survey collection was open between 12 September 2017 and 7 November 2017<sup>390</sup> to anyone “on, or had made a valid application to join, the Commonwealth electoral roll at close of business 24 August 2017”<sup>391</sup>. A total of 12,727,920 people participated, approximately 79.5% of those eligible<sup>392</sup>. The results were published on the 15<sup>th</sup> of November 2017<sup>393</sup>, with 61% of those surveyed responding that the law should be changed to allow same-sex couples to marry<sup>394</sup>.

Following the postal survey the government introduced the Marriage Amendment Act<sup>395</sup>. This act amends the Marriage Act 1961 in a number of ways, most notably by replacing the

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<sup>386</sup> Marriage Law Survey (Additional Safeguards) Act 2017, Located at <https://www.legislation.gov.au/Details/C2017A00096> accessed 05/08/2019, Section 13

<sup>387</sup> Marriage Law Survey (Additional Safeguards) Act 2017, Located at <https://www.legislation.gov.au/Details/C2017A00096> accessed 05/08/2019, Section 15

<sup>388</sup> Marriage Law Survey (Additional Safeguards) Act 2017, Located at <https://www.legislation.gov.au/Details/C2017A00096> accessed 05/08/2019, Sections 2-9

<sup>389</sup> Marriage Law Survey (Additional Safeguards) Act 2017, Located at <https://www.legislation.gov.au/Details/C2017A00096> accessed 05/08/2019, Sections 11-12

<sup>390</sup> Report on the conduct of the Australian Marriage Law Postal Survey 2017, Australian Bureau of Statistics, Located at [https://www.abs.gov.au/ausstats/abs@.nsf/6630eff525d4cdc1ca25763e0075754f/7cbde85f96095fa4ca25822400162fc2/\\$FILE/700652\\_ABS\\_AMLPS\\_A4\\_Report\\_Conduct\\_0118\\_FA4.002.pdf/700652\\_ABS\\_AMLPS\\_A4\\_Report\\_Conduct\\_0118\\_FA4.pdf](https://www.abs.gov.au/ausstats/abs@.nsf/6630eff525d4cdc1ca25763e0075754f/7cbde85f96095fa4ca25822400162fc2/$FILE/700652_ABS_AMLPS_A4_Report_Conduct_0118_FA4.002.pdf/700652_ABS_AMLPS_A4_Report_Conduct_0118_FA4.pdf), accessed 05/08/2019, Page 3

<sup>391</sup> Ibid

<sup>392</sup> Report on the conduct of the Australian Marriage Law Postal Survey 2017, Australian Bureau of Statistics, Located at [https://www.abs.gov.au/ausstats/abs@.nsf/6630eff525d4cdc1ca25763e0075754f/7cbde85f96095fa4ca25822400162fc2/\\$FILE/700652\\_ABS\\_AMLPS\\_A4\\_Report\\_Conduct\\_0118\\_FA4.002.pdf/700652\\_ABS\\_AMLPS\\_A4\\_Report\\_Conduct\\_0118\\_FA4.pdf](https://www.abs.gov.au/ausstats/abs@.nsf/6630eff525d4cdc1ca25763e0075754f/7cbde85f96095fa4ca25822400162fc2/$FILE/700652_ABS_AMLPS_A4_Report_Conduct_0118_FA4.002.pdf/700652_ABS_AMLPS_A4_Report_Conduct_0118_FA4.pdf) accessed 05/08/2019, Page 6

<sup>393</sup> 1088.0 Australian Marriage Law Postal Survey, 2017, Media Release, Australia supports changing the law to allow same-sex couples to marry, Australian Bureau of statistics, 15 November 2017, Located at <https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/C2DA40601247126DCA25822400106775?OpenDocument>, accessed 06/08/2019

<sup>394</sup> 1088.0 Australian Marriage Law Postal Survey, 2017, National Results, Australian Bureau of statistics, <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1800.0~2017~Main%20Features~Results~1> accessed 06/08/2019

<sup>395</sup> Marriage Amendment (Definition and Religious Freedoms) Act 2017

words “a man and a woman”<sup>396</sup> with the words “2 People”<sup>397</sup>. It also introduces other changes to render the legislation more gender neutral including replacing the words “A brother and sister”<sup>398</sup> with “2 siblings”<sup>399</sup> when addressing the types of pre-existing relationships that render a marriage void. The Amendment Act also introduced a right for ministers of a religion to refuse to solemnize a marriage if to do so would be contrary to their beliefs or the doctrine of their religion<sup>400</sup>. It is worth noting that this applies to any marriage, rather than only granting a right to refuse same-sex marriages. The applicability of this right to all marriages means that there is no need for a legal category of “same-sex marriages” and thus no need to identify which marriages are “same-sex” which eliminates any need to determine the sex of the participants which is the core of the marriage based issues faced by intersex and transgender people.

This implementation of same-sex marriage may perhaps be more aptly called “marriage equality”. This is because rather than creating a new category of permitted marriages which may occur between persons of the same sex, it instead universalizes marriage regardless of sex, gender or sexual orientation. This implementation removes the requirement to determine the sex or gender of the participants and does not apportion rights based on the sex or gender of the participants, resulting in a situation where there is highly unlikely to be any difficulty in accessing marriage among transgender or intersex people, regardless of their gender identity or physical characteristics in Australia unless the legislation is changed. It is interesting to note that despite the impact of the Marriage Amendment Act on trans and intersex people that there were no intersex or transgender people represented on the campaign materials during the 2017 survey<sup>401</sup>. As such this may be an example of how legislation intended to remedy injustice experienced by one group, in this case the predominantly LGB

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<sup>396</sup> Marriage Act 1961, Located at <https://www.legislation.gov.au/Details/C2016C00938> accessed 06/08/2019, Section 5 (1)

<sup>397</sup> Marriage Amendment (Definition and Religious Freedoms) Act 2017, <https://www.legislation.gov.au/Details/C2018C00423> accessed 06/08/2019, Section 3

<sup>398</sup> Marriage Act 1961, Located at <https://www.legislation.gov.au/Details/C2016C00938> accessed 06/08/2019, Section 23 (2) (b)

<sup>399</sup> Marriage Amendment (Definition and Religious Freedoms) Act 2017, <https://www.legislation.gov.au/Details/C2018C00423> accessed 06/08/2019, Section 7

<sup>400</sup> Marriage Amendment (Definition and Religious Freedoms) Act 2017, <https://www.legislation.gov.au/Details/C2018C00423> accessed 06/08/2019, Section 20

<sup>401</sup> Media@LSE Working Paper Series, Straightening out Same Sex Marriage for 'all' Australians, Tate Soller, Page 21 Located at [www.lse.ac.uk/media-and-communications/assets/documents/research/msc-dissertations/2018/soller.pdf](http://www.lse.ac.uk/media-and-communications/assets/documents/research/msc-dissertations/2018/soller.pdf) accessed 07/08/2019

people featured in materials produced by the yes campaign, can benefit another section of the population.

It is worth noting that while this document addresses the implementation of marriage equality in Australia beginning with the 2016 Plebiscite Bill there have been a number of previous attempts to amend the Marriage Act to produce such a result, beginning in 2004<sup>402</sup>. However to recount the entire history would constitute a lengthy aside and is better addressed by existing documents<sup>403</sup>.

### Passports:

Australian passports are managed on a federal level by the Department of Foreign Affairs and Trade. Australian passports contain a field in which a person can be recognised as Male (M) Female (F) or “indeterminate/intersex/unspecified”<sup>404</sup> (X). While the form required to amend this field on one’s passport refers to gender<sup>405</sup>, as do example images of Australian passports<sup>406</sup>, international standards refer to this field as denoting sex<sup>407</sup>.

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<sup>402</sup> Same Sex Relationships (Ensuring Equality) Bill 2004, Located at [https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r2057\\_first/toc\\_pdf/04079b01.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r2057_first/toc_pdf/04079b01.pdf;fileType=application%2Fpdf) accessed 07/08/2019

<sup>403</sup>, Parliamentary Library Quick Guide, Research paper series, 2017-2018, Chronology of Same-sex marriage bills introduced into the federal parliament: a quick guide, Deirdre McKeown, Parliament of Australia Department of Parliamentary Services, Updated 24 November 2017, Located at <https://apo.org.au/sites/default/files/resource-files/2017/11/apo-nid121006-1122106.pdf> accessed 07/08/2019

<sup>404</sup> Passports explained, Sex and gender diverse passport applicants, Department of Foreign Affairs and Trade, Australian Government, Located at <https://www.passports.gov.au/passports-explained/how-apply/eligibility-citizenship-and-identity/sex-and-gender-diverse-passport> accessed 07/08/2019

<sup>405</sup> Application for an Australian Travel Document, Form B-14, Department of Foreign Affairs and Trade, Australian Government, Located at <https://www.passports.gov.au/file/52/download?token=9gaPS9Bn> accessed 07/08/2019

<sup>406</sup> Unique Student Identifier, Forms of ID, Australian Passport, Australian Government, Located at <https://www.usi.gov.au/about/forms-id/australian-passport> accessed 07/08/2019

<sup>407</sup> Doc 9303, Machine Readable Travel Documents, Seventh Edition 2015, Page 3, International Civil Aviation Organisation, Located at [https://www.icao.int/publications/Documents/9303\\_p3\\_cons\\_en.pdf](https://www.icao.int/publications/Documents/9303_p3_cons_en.pdf) accessed 07/08/2019

In order to change their gender recognised on the passport an applicant must apply for a new passport, with the new passport being issued free of charge if their current passport will be valid for at least 2 more years<sup>408</sup>. This process requires one of the following forms of evidence:

“a gender recognition certificate issued by the Gender Reassignment Board, or a revised birth certificate showing the new sex issued by an RBDM, or a recognised details certificate, which records your new sex and current name, issued by an RBDM. Alternatively, or if you are transitioning to another sex, you can obtain a statement from a registered medical practitioner or psychologist that you have had or are receiving appropriate clinical treatment for gender transition. The nature of the treatment does not have to be specified.”<sup>409</sup>

The form required to alter ones recognised gender on their passport requires a statement from a professional who has a registration number with the Medical Board of Australia or the Psychology Board of Australia<sup>410</sup>. This professional must have either treated the applicant or reviewed their history and the form requires them to confirm that the applicant is either receiving clinical treatment for a sex/gender transition, is unable to undergo such treatment but is transgender and identifies as the gender to be recognised or that the applicant is intersex or of indeterminate sex<sup>411</sup>.

As the form requires either evidence from a doctor or from a psychologist, an intersex person choosing recognition may choose to use evidence from a psychologist, who need not be a doctor. As it is possible for a psychologist to have no expertise on anatomy, and there is no requirement for a physical examination of any kind it is possible for a person to be recognised as intersex despite the person providing evidence from a psychologist who has not gathered any medical data about a person’s physical state. While this is unlikely, as a psychologist will

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<sup>408</sup> Passports explained, Sex and gender diverse passport applicants, Department of Foreign Affairs and Trade, Australian Government, Located at <https://www.passports.gov.au/passports-explained/how-apply/eligibility-citizenship-and-identity/sex-and-gender-diverse-passport> accessed 07/08/2019

<sup>409</sup> Ibid

<sup>410</sup> Application for an Australian Travel Document, Form B-14, Department of Foreign Affairs and Trade, Australian Government, Located at <https://www.passports.gov.au/file/52/download?token=9gaPS9Bn> accessed 07/08/2019

<sup>411</sup> Ibid

most likely at the very least ask the applicant for their history, they may still be capable of providing valid evidence despite possibly being ill equipped to verify anything a patient tells them or conduct any further exploration of the issue. This, when combined with the fact that the B-14 form refers to gender, suggests that the intersex status being recognised, while using a word that traditionally refers to sex, is in fact recognising a kind of gender identity, rather than anything about a person's biology.

The idea of "intersex" being used as a term for a gender identity has been commented on by a number of intersex organisations and academics. Intersex Human Rights Australia, one of the major intersex advocacy organisations in Australia has stated

"We do not support the creation of sex or gender classifications using the term intersex. However, IHRA and other intersex-led organisations support new categories in certain circumstances: where they are open to all, irrespective of whether or not an individual has an intersex variation, and where they are not named or associated with the term intersex. We support multiple and alternative sex classifications. We support such classifications as an interim measure: we would prefer that, like with race and religion, identification documents do not classify individuals by sex or gender."<sup>412</sup>

In line with this the Darlington Statement, which was issued jointly by a number of Australian intersex organisations states:

"Regarding sex/gender classifications, sex and gender binaries are upheld by structural violence. Additionally, attempts to classify intersex people as a third sex/gender do not respect our diversity or right to self-determination. These can inflict wide-ranging harm regardless of whether an intersex person identifies with binary legal sex assigned at birth or not.

Undue emphasis on how to classify intersex people rather than how we are treated is also a

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<sup>412</sup> Identification documents, Morgan Carpenter, 4/01/2019, Intersex Human Rights Australia, Located at <https://ihra.org.au/identities/> accessed 08/08/2019

form of structural violence. The larger goal is not to seek new classifications but to end legal classification systems and the hierarchies that lie behind them. Therefore:

- a. As with race or religion, sex/gender should not be a legal category on birth certificates or identification documents for anybody.
- b. While sex/gender classifications remain legally required, sex/gender assignments must be regarded as provisional. Given existing social conditions, we do not support the imposition of a third sex classification when births are initially registered.
- c. Recognising that any child may grow up to identify with a different sex/gender, and that the decision about the sex of rearing of an intersex child may have been incorrect, sex/gender classifications must be legally correctable through a simple administrative procedure at the request of the individual concerned.
- d. Individuals able to consent should be able to choose between female (F), male (M), non-binary, alternative gender markers, or multiple options.”<sup>413</sup>

From this statement and the position of Intersex Human Rights Australia it seems evident that a consensus exists among intersex advocates in Australia that in general sex and gender identifiers on official documents should be eliminated, but while such identifiers do exist there should be no barriers as to which marker an individual uses. Additionally, if such markers are used they should not treat intersex as a separate category as this may contribute to the stigmatization of intersex people or the misassumption that intersex and non-binary identities are the same thing<sup>414</sup>.

In addition to being regarded as problematic by the intersex community, the recognition of intersex specifically as a gender identity as is done in Australia by the passport system has been criticised in of itself. Morgan Carpenter points out that intersex identity is polymorphic, meaning that it means different things to different people<sup>415</sup>. However this diversity of meanings does not necessarily render recognition of it meaningless as it “asserts the dignity

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<sup>413</sup> The Darlington Statement, 10 March 2017, Located at [darlington.org.au/statement/](http://darlington.org.au/statement/) accessed 08/08/2019

<sup>414</sup> The “Normalization” of Intersex Bodies and “Othering” of Intersex Identities in Australia  
Carpenter, M. *Bioethical Inquiry* (2018) 15: 487. <https://doi.org/10.1007/s11673-018-9855-8>

<sup>415</sup> The human rights of intersex people: addressing harmful practices and rhetoric of change, Morgan Carpenter (2016) , *Reproductive Health Matters*, 24:47, 74-84, DOI: 10.1016/j.rhm.2016.06.003, page 76 paragraph 2

of stigmatized embodiment”<sup>416</sup>, as recognition of an identity in this way demonstrates that there is a place for its existence and dignity within society. However many intersex people identify within binary genders and not as a separate intersex identity category<sup>417</sup>, and the recognition of intersex as a separate category may minimize the experiences and identities of these individuals. There is also a concern that recognition of intersex identity as a “third sex” homogenizes intersex experiences in a non-representational way and others intersex people outside of the “normal” binary sex categories, rather than widening the scope of what is normal<sup>418</sup>.

The recognition of intersex status in this way, as a gender identity raises a number of questions. Is this a recognition of the flexibility of identities and that what is normally seen as a set of sexual characteristics can be a crucial part of someone's identity, or does it harken back to more essentialist ideas, that a person's sex and gender identity are essentially the same? It may be a way of acknowledging the identities and existences of some intersex people while retaining the ability for them to identify with one of the other categories, which recognising intersex as a sex category may not have done. While the “true” meaning or intent of this measure is unclear, it has been criticised by the intersex community, although the Darlington statement sets out a fairly clear guide as to forms of recognition that would be more embraced by the community.

## Government guidance

The Australian government also has general guidance for the recognition and handling of information regarding gender and sex. These guidelines recognise a separation from gender, and that intersex people have a variety of gender identities<sup>419</sup>. The guidelines state that the Australian Government is primarily interested in a person's identity and social footprint, and

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<sup>416</sup> Ibid

<sup>417</sup> Intersex: Stories and Statistics from Australia. Jones T, Hart B, Carpenter M, et al Cambridge, UK: Open Book Publishers, 2016.

<sup>418</sup> The “Normalization” of Intersex Bodies and “Othering” of Intersex Identities in Australia  
Carpenter, M. *Bioethical Inquiry* (2018) 15: 487. <https://doi.org/10.1007/s11673-018-9855-8>

<sup>419</sup> Australian Government Guidelines on the Recognition of Sex and Gender, Australian Government, July 2013, Updated November 2015, Located at <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf> accessed 11/08/2019, Paragraph 2



as such information about sex is unlikely to ever be collected, however they also say that “Where sex and/or gender information is collected and recorded in a personal record, individuals should be given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified).”<sup>420</sup> which refers to the third category as denoting intersex, which, similar to the situation regarding passports seems to refer to intersex as a gender identity. However it is worth noting that in both the case of passports and these guidelines the X may denote identities other than intersex, in fact the guidelines explicitly state that the X category is intended for use by anyone who does not identify as exclusively male or female, regardless of what term they use to describe themselves<sup>421</sup>.

The guidelines also set out a procedure for amending one’s records regarding gender and sex. Once a person requests that their record be changed the relevant agencies must respond within 30 days<sup>422</sup>. Sexual reassignment surgery or other medical intervention are not required<sup>423</sup>. However one of the three possible forms of evidence is a statement from a doctor or psychologist. The other two are either a valid Australian Government travel document such as a passport, or a valid birth certificate from one of the states or territories denoting the gender to be recognised<sup>424</sup>. The third of these forms of evidence is somewhat interesting, as it seems to suggest that while the guidelines recognise a difference between sex and gender that

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<sup>420</sup> Australian Government Guidelines on the Recognition of Sex and Gender, Australian Government, July 2013, Updated November 2015, Located at <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf> accessed 11/08/2019, Paragraph 19

<sup>421</sup> Australian Government Guidelines on the Recognition of Sex and Gender, Australian Government, July 2013, Updated November 2015, Located at <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf> accessed 11/08/2019, Paragraph 20

<sup>422</sup> Australian Government Guidelines on the Recognition of Sex and Gender, Australian Government, July 2013, Updated November 2015, Located at <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf> accessed 11/08/2019, Paragraph 22

<sup>423</sup> Australian Government Guidelines on the Recognition of Sex and Gender, Australian Government, July 2013, Updated November 2015, Located at <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf> accessed 11/08/2019, Paragraph 23

<sup>424</sup> Australian Government Guidelines on the Recognition of Sex and Gender, Australian Government, July 2013, Updated November 2015, Located at <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf> accessed 11/08/2019, Paragraph 24

the sex field on a birth certificate can be sufficient. This may be an acknowledgement that the procedures for amending ones birth certificate in many of the states and territories do not recognise a separation between gender and sex and allow an applicant to amend their “sex” on the form without changing any of their physical attributes, although some do require surgery. These guidelines were well received by Intersex advocacy groups, including IHRA, which particularly praised the acknowledgement that intersex people may want to use the M or F categories instead of X, the acknowledgement of gender diversity among intersex people and the widening of the scope of evidence beyond medical evidence<sup>425</sup>.

### Concluding remarks

Overall the gender recognition systems in Australia are characterised by its diversity as a federal jurisdiction and a significant amount of progress on trans and intersex equality in recent years. Australia contains both some of the most and least progressive gender recognition systems examined in this thesis, however the number of changes in the law that have occurred while writing this chapter, and the fact that they seem to trend towards less rigorous evidential requirements and more recognition of individual autonomy appears to be an indication of progress. This may be due to the fact that Australia is home to some of the more active intersex organisations, which may explain the shift in methods of recognition used since the Norrie case. The Norrie case concerned the recognition of an intersex person via a non-binary marker on their birth certificate<sup>426</sup>. This initially appeared to be the direction that would be taken by Australia as a whole, that of recognising intersex status as a “third category”. However it appears that, apart from some purposes such as passports, this approach did not become widely favoured, perhaps in part due to the expressions of concern from the intersex community.

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<sup>425</sup> We welcome new federal guidelines on sex and gender recognition, Intersex Human Rights Australia, 13 June 2013, Located at <https://ihra.org.au/22636/welcome-guidelines-sex-gender-recognition/>, accessed 10/08/2019

<sup>426</sup> NSW Registrar of Births, Deaths and Marriages v Norrie [2014] HCA 11

## The legal situation in India.

The legal situation in India with regards to gender recognition can currently be regarded as very much in flux. Following a supreme court ruling in 2014<sup>427</sup> the country has been attempting to form a national legal gender recognition system where previously none existed. This makes it distinct from the UK, which may be reforming its gender recognition system to recognise non-binary gender and sex identities, as India has had no recognition system to revamp, but it can also be seen as distinct from other jurisdictions which are introducing recognition measures which previously had none. This is primarily because the cultural history surrounding the existence of non-binary gender identities in India is different to a

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<sup>427</sup>National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012

number of other jurisdictions considering implementing legal recognitions for such persons. As such the dialogue surrounding such measures, and the means of implementation are approached from a unique perspective, and in a few cases seem to have led to unique outcomes.

It is at this stage worth noting that India is a diverse country and is home to many diverse cultures, and while I will attempt to note that whenever it is relevant, some generalizations may occur. In addition it is worth noting that India is also diverse in terms of legal jurisdictions, with 29 states and 7 union territories, which each have responsibility for various matters involving transgender and intersex people. Due to the workload that examining each state or territory individually in detail would present, this piece will instead focus on a few states, where the legal provisions for persons with non-binary gender or sex identities are of particular interest. Additionally it is worth noting that documentation for each state or territory is not equally accessible, which has impacted my ability to provide information about them.

Indian law regarding transgender people can be seen as occurring in four phases. The pre-colonial phase, the colonial phase, the post-colonial phase and the current phase.

The pre-colonial period appears to have been characterized by a greater acceptance of transgender and intersex people, although this varied dramatically over time and varied from region to region. There is some inconsistency as to whether texts from this period are referring to transgender or intersex people, as the word hijra is often used interchangeably for both. The term hijra is often translated into English as eunuch, due to the usage of the term to refer to eunuchs amongst nobles in the region, particularly during the Mughal empire<sup>428</sup>. However the term now is used to refer to a number of identities, including transgender and intersex people, although the terms used and the meanings of those terms can vary based on region and culture, For example the Transgender community in Tamil Nadu refer to

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<sup>428</sup>Historical Evolution of Transgender Community in India, M. Michelraj, Asian Review of Social Sciences ISSN: 2249-6319 Vol. 4 No. 1, 2015, pp. 17-19, located at <http://www.trp.org.in/wp-content/uploads/2015/10/ARSS-Vol.4-No.1-Jan-June-2015-pp.17-19.pdf>, accessed 18/12/2020, page 18 paragraph 1

themselves as Aravanis due to identifying with the story of Aravan in the Mahabharata <sup>429</sup>. Reference to Hijras can be found in the Ramayana, when Rama, after being exiled, bids the men and women following him to return to their homes, the hijra among his followers remain, and were blessed as a result<sup>430</sup>. Reference to intersex people can also be found in the Manusmriti, a text of Hindu religious law, where they are referred to as being produced when an equal amount of male and female seed are present during conception<sup>431</sup>. However it should be noted that the presence an explanation for the existence of intersex people does not necessarily correspond to them being treated well, although the nature of the explanation as being due to natural phenomena could be regarded as positive, especially when compared to early explanations of intersex people in Europe which portrayed intersex people as being the product of sins of the mother during pregnancy<sup>432</sup>. A later passage of the Manusmriti states that a pious man should not accept food from a hermaphrodite, which places intersex people in the same category as unchaste women and those who have committed mortal sins<sup>433</sup>. As such it may be somewhat of an oversimplification to state that transgender and intersex people were universally respected in the pre-colonial period, when their treatment seems to vary based on region, culture and time. However their existence was recognised, and they could be said for much of the pre-colonial period to have a defined position in society, which while it may have varied, may still be regarded as generally better than the position of transgender and intersex people in those jurisdictions where they were regarded as sinful, perverse or medical curiosities.

During British control over the region the treatment of transgender and intersex people worsened significantly<sup>434</sup>. Section 377 of the Indian Penal Code which criminalized “carnal intercourse against the order of nature with any man, woman or animal” was enforced against

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<sup>429</sup>Quality Of Life among Transgenders in Kerala, IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 22, Issue 7, Ver. 9 (July. 2017) PP 19-24 Aneesh M S located at <http://www.iosrjournals.org/iosr-jhss/papers/Vol.%2022%20Issue7/Version-9/B2207091924.pdf>, accessed 28/12/2020

<sup>430</sup>Cited in National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 13

<sup>431</sup> Manusmriti, The Laws of Manu, Translated by George Bühler, located at [www.hinduwebsite.com/sacredscripts/hinduism/dharma/manusmriti\\_1.asp](http://www.hinduwebsite.com/sacredscripts/hinduism/dharma/manusmriti_1.asp) Chapter 3 verse 49

<sup>432</sup>The Masterpiece and other works, "Aristotle, the Famous Philosopher", Ex-classics Project, 2010, Located at <https://www.exclassics.com/arist/arist.pdf>, accessed 28/12/2020

<sup>433</sup> Manusmriti, The Laws of Manu, Translated by George Bühler, located at [www.hinduwebsite.com/sacredscripts/hinduism/dharma/manusmriti\\_1.asp](http://www.hinduwebsite.com/sacredscripts/hinduism/dharma/manusmriti_1.asp) Chapter 4 verse 229

<sup>434</sup>As mentioned in National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 16

the hijra community, as they were often perceived as being homosexual<sup>435</sup>. In addition to this the Criminal Tribes Act<sup>436</sup> specifically mandates the creation of registers of those identified as eunuchs<sup>437</sup>, who are defined in the act as those who self-identify as such or any male who is found to be impotent after inspection by a medical professional<sup>438</sup>. While the word eunuch is used in the act, not only is this Act cited as impacting hijra communities<sup>439</sup>, but it is also seems reasonable that given the translation of the words hijra and eunuch that when the act was enforced the two terms would have been used interchangeably despite not having identical meanings. This act required anyone registered in this manner to give a full accounting of their property and any held in trust for them and forbade them from making a will, acting as a guardian to any minor, making gifts or adopting a son<sup>440</sup>. The act also permits for “Any eunuch so registered who appears, dressed or ornamented like a woman, in a public street or in any other place, with the intention of being seen from a public street or place, or who dances or plays music or takes part in any public exhibition in a public street or place or for hire in a private house” to be arrested without warrant and a to be given a fine of an unspecified amount or imprisoned for up to two years<sup>441</sup>. The act provided no process for a person who finds themselves registered under the act, except that they were permitted to complain to an officer appointed by the local government, who could decide to keep the entry or erase it “as he sees fit”, with no guidance as to how this discretion should be exercised. Such decisions could be reviewed by the commissioner, but this review was again solely discretionary<sup>442</sup>. The act was repealed, first in various regions as early as 1947<sup>443</sup>, and then nationally in 1952<sup>444</sup>.

Following British rule, while the treatment of transgender people could be said to have improved somewhat, they were still discriminated against significantly, which left them often

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<sup>435</sup>For example *Queen Empress v. Khairati* (1884) ILR 6 All 204

<sup>436</sup>Criminal Tribes Act 1871

<sup>437</sup>Criminal Tribes Act 1871 part 2

<sup>438</sup>Criminal Tribes Act 1871 section 24 (b)

<sup>439</sup>National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 16

<sup>440</sup>Criminal Tribes Act 1871 section 29

<sup>441</sup>Criminal Tribes Act 1871 section 26

<sup>442</sup>Criminal Tribes Act 1871 section 25

<sup>443</sup> Postcolonial penalty: Liberty and repression in the shadow of independence, India c. 1947, Mark Brown, *Theor Criminol.* 2017 May; 21(2): 186–208, Paragraph 28

<sup>444</sup> Postcolonial penalty: Liberty and repression in the shadow of independence, India c. 1947, Mark Brown, *Theor Criminol.* 2017 May; 21(2): 186–208, Paragraph 57

unable to secure housing and education<sup>445</sup>. The lack of legislation regarding transgender or intersex people posed significant problems for those communities, not only due to lack of recognition or legal status, but also due to the lack of clarification on the legality of transgender medical procedures, which made a number of practitioners hesitant to treat transgender people<sup>446</sup>. In addition to this some pieces of legislation which posed an issue for transgender people during British rule still remained until very recently, particularly section 377 which remained the law of the land until it was found unconstitutional in 2018<sup>447</sup>.

The ruling in *NLSA v Union India* is hoped to bring a close to this period, mandating legal recognition and other legal protections for transgender and intersex people in India. Due to its scope and possible future impact, as well as the changes already in place due to the ruling, it is worth examining in some detail. This case arose from two petitions, addressed together due to relating to similar issue relating to the violation of the rights of transgender and intersex people in India due to the lack of legal recognition. These petitions, brought by the National Legal Services Authority and the Poojaya Mata Nasib Kaur Ji Women Welfare Society, alleged that the lack of legal recognition for transgender and intersex people, including the various non-binary identities present in India including hijra, results in a violation of their rights under sections 14, 16 and 21 of the Indian constitution<sup>448</sup>. These articles concern equality under the law<sup>449</sup>, equality of opportunity regarding employment by the state or appointment to public office<sup>450</sup> and protection from deprivation of life or liberty except through due process of law<sup>451</sup>.

The court found that section 14 was violated, with justice K.S. Radhakrishnan noting that “Article 14 does not restrict the word ‘person’ and its application only to male or female.”<sup>452</sup>

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<sup>445</sup> National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 112

<sup>446</sup> Treating transsexuals in India: History, prerequisites for surgery and legal issues, Richie Gupta and Anil Murarka, *Indian J Plast Surg.* 2009 Jul-Dec; 42(2): 226–233, paragraph 1

<sup>447</sup> Navtej Singh Johar v. Union of India W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

<sup>448</sup> National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 5

<sup>449</sup> The Constitution of India, 1949, located at

[https://www.india.gov.in/sites/upload\\_files/npi/files/coi\\_part\\_full.pdf](https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf) section 14

<sup>450</sup> The Constitution of India, 1949, located at

[https://www.india.gov.in/sites/upload\\_files/npi/files/coi\\_part\\_full.pdf](https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf) section 16

<sup>451</sup> The Constitution of India, 1949, located at

[https://www.india.gov.in/sites/upload\\_files/npi/files/coi\\_part\\_full.pdf](https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf) section 21

<sup>452</sup> National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012

The court also found that sufficient evidence had been produced that transgender people did face significant discrimination and difficulties, not only in general but also specifically due to the lack of legal recognition, particularly in the cases of public bathrooms, interactions with the police and education. The court found that this amounted to discrimination on the grounds of gender identity or sexual orientation and this was contrary to the equal protections granted by article 14<sup>453</sup>.

Justice Radhakrishnan addresses section 15 together with section 16, section 15 being somewhat related to 16, as it prohibits discrimination by the state on a number of grounds, including that of sex<sup>454</sup>. Section 15 also permits the state to take measures to remedy the situation of “socially and educationally backward classes”<sup>455</sup>. The court found that the wording of these sections, when they refer to sex, refer to both sex and gender, as the court found gender to be a part of sex saying that:

“Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one’s self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of ‘sex’ under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression ‘sex’ used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female.”<sup>456</sup>

The court also points out that one of the purposes behind sections 15 and 16 was to prevent people from being punished or treated differently because they did not conform to stereotypical generalizations of binary genders<sup>457</sup>. As such even if the court had not found

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paragraph 54

<sup>453</sup> National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 55

<sup>454</sup> The Constitution of India, 1949, located at [https://www.india.gov.in/sites/upload\\_files/npi/files/coi\\_part\\_full.pdf](https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf) section 15

<sup>455</sup> The Constitution of India, 1949, located at [https://www.india.gov.in/sites/upload\\_files/npi/files/coi\\_part\\_full.pdf](https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf) section 15(4)

<sup>456</sup> National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 59

<sup>457</sup> Ibid



that gender can be considered a part of sex, it is possible that they may have found that the word sex in these sections intends to include sex because of the intention of those who wrote the constitution that protection from discrimination based on sex necessarily must mean protection from discrimination due to adopting or failing to adopt gendered behaviours or signifiers stereotypically expected of any particular binary sex.

The court found that transgender people had been discriminated against with regards to access to public spaces, and to public office, and that this discrimination was contrary to the relevant sections of the constitution<sup>458</sup>. Furthermore the court found that transgender and intersex people should be considered a “socially backward class” and that the government should take action under section 15 (4) “so that the injustice done to them for centuries could be remedied.”<sup>459</sup>

The court also found that the legal situation of transgender people engaged the right to freedom of expression under section 19 of the constitution<sup>460</sup>. The court referred to cases in the United States which referred to a law which had prohibited cross-dressing<sup>461</sup> and a case where students had been prohibited from dressing in accordance with their gender identity<sup>462</sup>. In these cases it had been found that the right to determine one's appearance is a fundamental part of freedom of expression and that the right to express one's gender is a necessary symbol of identity. The court used these cases to show that “Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India.”<sup>463</sup>

The court found that legal recognition of one's gender identity is essential in realizing the right to dignity<sup>464</sup>, which is a part of the right to life and liberty guaranteed under section

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<sup>458</sup>National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 60

<sup>459</sup>Ibid

<sup>460</sup>The Constitution of India, 1949, located at [https://www.india.gov.in/sites/upload\\_files/npi/files/coi\\_part\\_full.pdf](https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf) section 19

<sup>461</sup>City of Chicago v. Wilson et al, 75 Ill.2d 525(1978)

<sup>462</sup>Doe v. Yunits et al., 2000 WL33162199 (Mass. Super.)

<sup>463</sup>National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 66

<sup>464</sup>National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 68

21<sup>465</sup>. The court also pointed out that it had previously found that another part of the right to life and liberty is the right to personal autonomy<sup>466</sup> and stated that such a right includes the right to self-determination of gender<sup>467</sup>.

The court offers numerous other justifications for legal recognition of transgender people, including that enabling each member of society to reach their potential ultimately results on good for society in general<sup>468</sup>, and that granting such legal recognition is necessary for India to meet its obligations under international law<sup>469</sup>.

It is worth noting that the approach taken in this case may not be applicable to other jurisdictions, not only because of the basis of parts of it in the cultural history of India and the gender diversity already culturally recognised in that country, but also because it does rely on the nature of the constitution as a “living document”<sup>470</sup>, which can be interpreted to reach conclusions which, while they may be consistent with the original document, would not have been contemplated by the original creators of the document. While other jurisdictions do make use of this concept, in others its use has attracted some controversy, as such the route to reform represented by this ruling will only be applicable to jurisdictions where the constitution is regarded as a living document.

It is worth noting that throughout the ruling the terms “transgender/hijra” are used to refer to both intersex and transgender person and that these terms are often used interchangeable within the judgement, as shown when the terms hijra and eunuch are defined as being types of transgender identity<sup>471</sup>. The ruling also uses a number of other terms in unusual ways, in particular this is noticeable when the court refers to gender as being a part of sex and when

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<sup>465</sup>Referring to *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (1981) 1 SCC 608

<sup>466</sup>*In Anuj Garg v. Hotel Association of India* (2008) 3 SCC 1

<sup>467</sup>*National Legal Services Authority v Union of India and others*, writ petition (civil) NO. 400 of 2012 paragraph 69

<sup>468</sup>*National Legal Services Authority v Union of India and others*, writ petition (civil) NO. 400 of 2012 paragraph 102

<sup>469</sup>*National Legal Services Authority v Union of India and others*, writ petition (civil) NO. 400 of 2012 paragraph 53

<sup>470</sup>*National Legal Services Authority v Union of India and others*, writ petition (civil) NO. 400 of 2012 paragraph 122

<sup>471</sup>*National Legal Services Authority v Union of India and others*, writ petition (civil) NO. 400 of 2012 paragraph 44

justice A.K.Sikri) states that “Even Gay, Lesbian, bisexual are included by the descriptor ‘transgender’.”<sup>472</sup> but then goes on to explain that the current ruling is restricted to transgender people in the specific Indian context, which they define as relating to the cultural history of hijras and other cultural groups<sup>473</sup>.

The court ultimately made a number of declarations, including that hijras and eunuchs be legally recognised as a third gender, that they be treated as an educationally backward class and that the national and local governments must take action to address discrimination and stigmatization of transgender identities, as well as requiring the government to take specific measures such as to include transgender people in HIV monitoring and treatment efforts as well as requiring national and state governments to “...also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.”<sup>474</sup> The ruling concludes by noting that a review of the law was already in progress at the time of the judgement and required the reconsiderations made by that review to be based on the declarations in the judgement and for those recommendation to be implemented within 6 months<sup>475</sup>.

Following this ruling a number of efforts were initiated to attempt to bring laws and executive practices into compliance with the ruling, including the creation of a bill designed to protect the rights of trans citizens<sup>476</sup>.

The 2016 bill included a number of provisions that were recommended in the committee report such as protection from discrimination<sup>477</sup>. However the bill itself was criticised for

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<sup>472</sup>National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 107

<sup>473</sup>National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 109

<sup>474</sup>National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 129

<sup>475</sup>National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 130

<sup>476</sup>The Transgender Persons (protection of rights) Bill, 2016

<sup>477</sup>The Transgender Persons (protection of rights) Bill, 2016 Section 3

having “failed the community”<sup>478</sup> as it has a number of unusual features which did not find favour with the transcendent community. The starts with an unusual definition of the term transgender, defining it as:

“2 (i) "transgender person" means a person who is—

(A) neither wholly female nor wholly male; or

(B) a combination of female or male; or

(C) neither female nor male; and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers”<sup>479</sup>

This definition does not match the definition of transgender used by various other bodies, such as the American Psychological Association<sup>480</sup>, and also differs from the definition used by the committee<sup>481</sup>, the findings of which were intended to form the basis of the legislation. This definition has not been well received by the community<sup>482</sup>.

The Bill included other controversial aspects, in particular its gender recognition provisions were criticised for being contrary to modern best practice<sup>483</sup>. This part of the Act begins somewhat confusingly;

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<sup>478</sup> The New Transgender Bill Fails the Community, Danish Sheikh, The Wire, 04/AUG/2016 located at <https://thewire.in/gender/failures-of-the-new-transgender-bill>, accessed 28/12/2020

<sup>479</sup> The Transgender Persons (protection of rights) Bill, 2016, Section 2

<sup>480</sup> American Psychological Association, Transgender People, Gender Identity and Gender Expression, located at [www.apa.org/topics/lgbt/transgender.aspx](http://www.apa.org/topics/lgbt/transgender.aspx), accessed 15/05/2018

<sup>481</sup> Report of the Expert Committee on Issues Relating to Transgender Persons, located at [socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf](http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf), accessed 28/12/20, page 65 of the pdf

<sup>482</sup> All you need to know about the Transgender Persons Bill, 2016 Rohan Abraham, The Hindu, November 30 2017, located at [www.thehindu.com/news/national/all-you-need-to-know-about-the-transgender-persons-bill-2016/article21226710.ece](http://www.thehindu.com/news/national/all-you-need-to-know-about-the-transgender-persons-bill-2016/article21226710.ece), accessed 28/12/2020

<sup>483</sup> All you need to know about the Transgender Persons Bill, 2016 Rohan Abraham, The Hindu November 30 2017, located at [www.thehindu.com/news/national/all-you-need-to-know-about-the-transgender-persons-bill-2016/article21226710.ece](http://www.thehindu.com/news/national/all-you-need-to-know-about-the-transgender-persons-bill-2016/article21226710.ece), accessed 28/12/2020 paragraph 9

“4. (1) A transgender person shall have a right to be recognised as such, in accordance with the provisions of this Act.

(2) A person recognised as transgender under sub-section (1) shall have a right to selfperceived gender identity.”<sup>484</sup>

This is somewhat self contradictory, as it grants a right to “selfperceived gender identity”, this wording would lead one to believe that it refers to a system of “self-identification”, a system in which a person may have their gender recognised on condition that they sign a document verifying that it is in fact their gender. The main distinguishing feature of a system of self-identification is that the system does not involve any sort of gender recognition panel or require any expert testimony or verification, a person is trusted to identify their own gender. However the system proposed by this bill does not match this description. This system requires a person to make an application to a district magistrate<sup>485</sup>, who must then refer the matter to a District Screening Committee<sup>486</sup>, who will then make recommendation, which are then sent back to the magistrate to form the basis of the decision of whether to grant “a certificate of identity as transgender person”<sup>487</sup>. There are no other criteria given which the magistrate may use to make their decision, so it appears that the sole factor they should consider is the recommendation given by the committee. As such it seems strange that there are so many steps, or even that the magistrate is involved at all, as if the only thing they may consider is the decision of the committee, why not simply have someone apply directly to the committee, which can issue the certificate directly, as is done in other jurisdictions such as the U.K<sup>488</sup>. Not only is this system seemingly needlessly complex, but the requirement for a panel of experts to review a person’s application seems to place this system outside the realm of systems that could be said to enable self-identification. Because of this, it is not clear what section 4 means when it states that a person recognised by the procedure set out in the act “shall have a right to selfperceived gender identity”<sup>489</sup>. What does it mean, to have a right to a self perceived identity if the right to that identity is dependent on going

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<sup>484</sup> The Transgender Persons (protection of rights) Bill, 2016, Section 4

<sup>485</sup> The Transgender Persons (protection of rights) Bill, 2016, Section 5

<sup>486</sup> The Transgender Persons (protection of rights) Bill, 2016, Section 6

<sup>487</sup> The Transgender Persons (protection of rights) Bill, 2016, Section 7

<sup>488</sup> As per the Gender Recognition Act 2004

<sup>489</sup> The Transgender Persons (protection of rights) Bill, 2016, Section 4 (2)

through a process of having your identity validated by others? Also, what does to have the right to an identity mean? Does this mean the right to legal recognition of this identity? It seems as though it must, otherwise this section implies that a person has no right to have their identity until it is legally recognised by others, but if it does mean the right to have that identity legally recognised, why does it say that the right is to a self-perceived identity, when the method of legal recognition recognises a socially perceived identity, verified by experts? While the identity recognised by the committee may align with someone's self-perception, that perception is not determine ones recognised gender under this system, the perception of the committee does. Furthermore if a person's self-perceived identity changes do they then have the right to have that identity recognised without needing to apply to the panel? This seems not to be the case, as this is mentioned nowhere in the act.

It is worth noting that this system was not present in the 2014 version of the Bill<sup>490</sup>. The 2014 version of the bill also had a definition of transgender which more closely conforms to those made by the expert committee and other organisations<sup>491</sup>.

Since the 2016 bill was proposed it has been criticised by the Standing Committee on Social Justice<sup>492</sup>, which as reportedly lead to a number of revisions being made to the bill<sup>493</sup>, including changes to the definition of transgender<sup>494</sup>, although the text of the revised version was not available at the time of writing.

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<sup>490</sup> The Transgender Persons (protection of rights) Bill, 2014, Bill No. XLIXC-C of 2014, Located at <http://www.prsindia.org/uploads/media/Transgender/Transgender%20Bill,%202015%20-%20PMB%20passed%20in%20RS.pdf>

<sup>491</sup> The Transgender Persons (protection of rights) Bill, 2014, Bill No. XLIXC-C of 2014, Located at <http://www.prsindia.org/uploads/media/Transgender/Transgender%20Bill,%202015%20-%20PMB%20passed%20in%20RS.pdf> s2 (t)

<sup>492</sup> Forty-Third report, Standing Committee on Social Justice and Empowerment (2016-2017), July 2017, located at [www.prsindia.org/uploads/media/Transgender/SCR%20Transgender%20Persons%20Bll%202016.pdf](http://www.prsindia.org/uploads/media/Transgender/SCR%20Transgender%20Persons%20Bll%202016.pdf), accessed 28/12/2020 at 1.16

<sup>493</sup> India Gets Another Chance Protecting Transgender Rights, Meenakshi Ganguly, Kyle Knight, Human Rights Watch, February 22 2018, located at <https://www.hrw.org/news/2018/02/22/india-gets-another-chance-protecting-transgender-rights>, accessed 28/12/2020

<sup>494</sup> India Gets Another Chance Protecting Transgender Rights, Meenakshi Ganguly, Kyle Knight, Human Rights Watch, February 22 2018, located at <https://www.hrw.org/news/2018/02/22/india-gets-another-chance-protecting-transgender-rights>, accessed 28/12/2020, paragraph 2

Until a national transgender rights bill was successfully passed there was no national statute regarding transgender and intersex people and their rights. Because of this gender recognition measures were largely implemented either through procedure changes at an executive level or through legislation at a regional level.

In 2019 the Transgender Persons (Protection of Rights) Act<sup>495</sup> was passed. This act provides a national gender recognition framework, however the way in which it was implemented left much to be desired. The gender recognition system created by the Act has two phases. First a person must be recognised as a transgender person<sup>496</sup>. This is done by applying to the local district magistrate who will grant the application “after following such procedure and in such form and manner, within such time, as may be prescribed indicating the gender of such person as transgender.”<sup>497</sup> Once this application has been successful the applicant is eligible to change the first name recorded on their birth certificate or any other identity documents, but notably not eligible to change the sex recorded on the certificate<sup>498</sup>. The Act does not specify any evidential requirements for this process. Once a person has been recognised as transgender they may then, if they have had surgery, apply to be recognised as either male or female<sup>499</sup>, which is done by amending the certificate of identity, rather than their birth certificate<sup>500</sup>.

The 2019 Act was criticised on a number of grounds. The first ground was that the use of district magistrates and the lack of guidance as to how they were to decide whether or not to issue certificates of identity risked inconsistency and possibly the arbitrary exercise of

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<sup>495</sup> The Transgender Persons (Protection of Rights) Act, 2019 NO. 40 of 2019

<sup>496</sup> The Transgender Persons (Protection of Rights) Act, 2019 NO. 40 of 2019, Section 4

<sup>497</sup> The Transgender Persons (Protection of Rights) Act, 2019 NO. 40 of 2019, Section 6 (1)

<sup>498</sup> The Transgender Persons (Protection of Rights) Act, 2019 NO. 40 of 2019, Section 7 (3)

<sup>499</sup> The Transgender Persons (Protection of Rights) Act, 2019 NO. 40 of 2019, Section 7

<sup>500</sup> The Transgender Persons (Protection of Rights) Act, 2019 NO. 40 of 2019, Section 7 (2)

power<sup>501</sup>. Additionally, it was also criticised for its requirement of surgery<sup>502</sup> and its focus on Hijras and the relative lack of attention paid to trans men and intersex people<sup>503</sup>.

In part in response to these criticisms the Transgender Persons (Protection of Rights) Rules were issued in 2020<sup>504</sup>. These regulations are made under section 22 of the Act which permits the creation of rules regarding the implementation of the Act, including the form and manner in which applications under Sections 5 and 7 are made<sup>505</sup>. The rules address the criticism of the surgical requirement by “circumventing”<sup>506</sup> it. This is accomplished via rule 6, which allows for anyone who has received “medical intervention towards a gender affirming procedure, either as male or female” to submit evidence of this to the district magistrate, who will then issue a revised certificate of identity<sup>507</sup>. The rules use a broad definition of medical intervention, which includes counselling, hormone therapy and surgery<sup>508</sup>. This appears to have the effect of creating a parallel system of having one’s gender recognised as male or female to the one addressed in section 7 of the Act. Despite the apparent progress with regards to the medical requirements for recognition the Rules have been criticised as being “a half-hearted attempt at a comprehensive framework for securing trans rights in India.”<sup>509</sup> Due to the lack of regard for intersex people among other flaws.

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<sup>501</sup> India’s Transgender Rights Law Isn’t Worth Celebrating, Kyle Knight, 5 December 2019, Originally published in The Advocate, Located at <https://www.hrw.org/news/2019/12/05/indias-transgender-rights-law-isnt-worth-celebrating>, accessed 01/01/2021, paragraph 4

<sup>502</sup> India’s Transgender Rights Law Isn’t Worth Celebrating, Kyle Knight, 5 December 2019, Originally published in The Advocate, Located at <https://www.hrw.org/news/2019/12/05/indias-transgender-rights-law-isnt-worth-celebrating>, accessed 01/01/2021, paragraph 6

<sup>503</sup> The Transgender Persons Bill explained, The Hindu Net Desk, November 30 2019, Located at <https://www.thehindu.com/news/national/watch-all-about-the-transgender-persons-bill/article30122229.ece>, accessed 01/01/2021

<sup>504</sup> Transgender Persons (Protection of Rights) Rules, 2020.

<sup>505</sup> The Transgender Persons (Protection of Rights) Act, 2019 NO. 40 of 2019, Section 22

<sup>506</sup> Transgender Persons Rules 2020: A Halfhearted Attempt at Redemption, Anamika Dudvaani and Rishav Devrani, OxHRH Blog, October 2020, <http://ohrh.law.ox.ac.uk/transgender-persons-rules-2020-a-halfhearted-attempt-at-redemption>, accessed 01/01/21, paragraph 2

<sup>507</sup> Transgender Persons (Protection of Rights) Rules, 2020. Rule 6

<sup>508</sup> Transgender Persons (Protection of Rights) Rules, 2020. Rule 2 (i)

<sup>509</sup> Transgender Persons Rules 2020: A Halfhearted Attempt at Redemption, Anamika Dudvaani and Rishav Devrani, OxHRH Blog, October 2020, <http://ohrh.law.ox.ac.uk/transgender-persons-rules-2020-a-halfhearted-attempt-at-redemption>, accessed 01/01/21, paragraph 6



The following sections address gender recognition in practice in the particular situations of passports, marriage and prisons. Due to the number of jurisdictions within India which differ in their gender recognition measures only national rules will be discussed, with the addition a few regions which shall be addressed here if the approach taken in that jurisdiction is unusual in such a way that necessitates of special mention.

### Passports:

Indian passports require an applicant to state their gender, which may be marked on the application form as male, female or transgender<sup>510</sup>. While transgender is a category separate from male and female on the application form there is no indication that all transgender people must identify their gender as such on the form, rather than male or female, so this category is presumably for those who identify as a culturally recognised third gender which, as seen in supreme court ruling, are sometimes referred together as transgender despite transgender people who identify with binary genders also being acknowledged. There is no indication that additional evidence is required for a person identifying as transgender than would be required in any other case<sup>511</sup>.

If a person already has an Indian passport it is possible to have the gender marker changed, although this requires the passport to be re-issued<sup>512</sup>. This requires the applicant to submit evidence, including the original passport, a sworn affidavit of change of sex and certification from a hospital that the applicant has undergone sex reassignment surgery<sup>513</sup>. This is noteworthy for a number of reasons. Firstly, the information required refers to physical sex,

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<sup>510</sup>Passport application form, Located at <https://portal1.passportindia.gov.in/AppOnlineProject/online/downloadEFormStatic> accessed 19/06/2018

<sup>511</sup>There is no evidence of this on the passport office website or on the guidance documents.

<sup>512</sup>Consular, Passport and Visa Division, Ministry of External Affairs, Application Form Overview, Passport Seva, Government of India, Located at <https://portal1.passportindia.gov.in/AppOnlineProject/online/faqApplicationForm>, accessed 19/06/2018

<sup>513</sup>Consular, Passport and Visa Division, Ministry of External Affairs, Application Form Overview, Passport Seva, Government of India, Located at <https://portal1.passportindia.gov.in/AppOnlineProject/online/faqApplicationForm>, accessed 19/06/2018, This information is available after selecting the following options, a normal application for an adult, employment type other with no change of address and no eligibility for non ECR category.

but the field to be changed on the passport application form refers to gender, which may indicate a conflation of sex and gender. Secondly these evidential requirements may cause a number of problems. Any system that requires evidence of sex reassignment surgery will encounter a number of problems simply due to that requirement alone. The practice of requiring such evidence may be contrary to a person's human rights. A 2014 interagency statement issued by the World Health Organisation, UN Women and UN Aids amongst others referred to such requirements as sterilization requirements, and stated that they "... run counter to respect for bodily integrity, self-determination and human dignity, and can cause and perpetuate discrimination against transgender and intersex persons."<sup>514</sup> In addition to this a 2013 report from the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment called upon all states to end such requirements<sup>515</sup>. On a fundamental level, if to have one's gender legally recognised is regarded as a right, it may seem strange that, while most of the population access this right automatically at birth, a minority group must accept sterilization to obtain a right that those in the majority are granted simply for being born. This issue was raised in a European Court of Human Rights case, where it was stated that:

"Medical treatment cannot be considered to be the subject of genuine consent when the fact of not submitting to it deprives the person concerned of the full exercise of his or her right to gender identity and personal development"<sup>516</sup>

While India is not a party to the European Convention on Human rights, this ruling can still be regarded as being persuasive, as while the specifics of the margin of appreciation will only be applicable within states that are parties to the ECHR, the reasoning regarding human rights may have broader applications. The reasoning deployed in this case raises the issue that

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<sup>514</sup>Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. Located at [http://apps.who.int/iris/bitstream/handle/10665/112848/9789241507325\\_eng.pdf;jsessionid=99B16BC382FF84A6BB476E18E2241935?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/112848/9789241507325_eng.pdf;jsessionid=99B16BC382FF84A6BB476E18E2241935?sequence=1), accessed 11/07/2018, page 7 paragraph 4

<sup>515</sup>Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, United Nations General Assembly, Human Rights Council, Twenty-second session, February 2013, Located at [https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf), accessed 09/01/2021, para 88

<sup>516</sup>A.P., Garçon and Nicot v France applications 79885/12, 52471/13 and 52596/13 text located at <http://hudoc.echr.coe.int/eng?i=001-172913> accessed 21/07/2018 at para 131

beyond undermining the universality of the right to one's gender identity, restricting a person's right in this way is inherently coercive. Due to this coercive influence the practice of requiring those seeking gender recognition to have sterilising surgeries means that the consent given to these surgeries is not freely given. As such these requirements not only undermine a person's right to their gender identity but also undermine their right to bodily autonomy.

In addition to these issues these requirements may be particularly problematic in the Indian context, where transgender and intersex status and identity are so strongly attached to various cultural groups. In such a situation it could be argued that sterilization requirements are particularly concerning due to the history of forced or coerced sterilization being used against minority cultural and ethnic groups to control or exterminate those groups<sup>517</sup>.

Surgical requirements can also be problematic on a practical level. The first issue in this regard is that many transgender people simply do not choose to have surgery<sup>518</sup>. This can be for a number of reasons, for example they may be unable to afford it, may have personal reasons for not wanting it or may simply not find the surgery not to be worth the risks in their individual case. This may be particularly the case in India, due to cultural gender identities such as hijra not having the same association with surgery as binary transgender identities elsewhere in the world. While national level data is not readily available, a survey of transgender people in Kerala showed that only 9 percent of transgender people had changed their appearance through medical or surgical means<sup>519</sup>, so the figures for those who have had surgery may well be significantly lower. This means that any system for gender recognition

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<sup>517</sup>Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. Located at [http://apps.who.int/iris/bitstream/handle/10665/112848/9789241507325\\_eng.pdf;jsessionid=99B16BC382FF84A6BB476E18E2241935?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/112848/9789241507325_eng.pdf;jsessionid=99B16BC382FF84A6BB476E18E2241935?sequence=1), accessed 11/07/2018, Page 2 paragraph 2

<sup>518</sup> For example in a US survey the majority of respondents had not had surgical interventions National Transgender Discrimination Survey Report on health and health care, Findings of a Study by the National Center for Transgender Equality and the National Gay and Lesbian Task Force By Jaime M. Grant, Ph.D., Lisa A. Mottet, J.D., and Justin Tanis, D.Min. With Jody L. Herman, Ph.D., Jack Harrison, and Mara Keisling October 2010, located at [www.thetaskforce.org/static\\_html/downloads/resources\\_and\\_tools/ntds\\_report\\_on\\_health.pdf](http://www.thetaskforce.org/static_html/downloads/resources_and_tools/ntds_report_on_health.pdf), accessed 24/07/2018, pages 11-12

<sup>519</sup> Transgender survey Kerala 2014-2015, Submitted to the Director, Departement of Social Justice, Government of Kerala by Sangama, 50/1899 kochuveeti House, Major Road, Vyttila, Cochin, Kerala 682019 located at <http://sjd.kerala.gov.in/DOCUMENTS/Report/Survey%20Report/12157.pdf>, accessed 24/07 2018, Page 30

which contains surgical requirements must seriously consider whether or not these surgical requirements meet the goals of the system. If the goal of the system is to grant legal force to a person's gender identity, but that system contains surgical requirements then it will not achieve its goal in most cases. Such requirements often exist because such systems wish to restrict recognition, and only give it to people who meet the criteria in which the culture in which the system exists has established. Often this is sterilization, as some cultures believe that one should not be recognised as a woman if they are still capable of "fathering" a child. In other cases it is simply a requirement of physical conformity, to ensure that all those legally recognised as members of a gender share certain physical characteristics. While these requirements may seem to serve the needs of the society in which they exist, in terms of who a society is comfortable perceiving as a man or a woman, it should be noted that as these requirements are physical in nature, they can have little bearing on an individual's gender identity. A person may have any gender identity, regardless of their physical characteristics. A person's experience of their gender, while it can be impacted by their physical characteristics, is not understood to be dependant on them<sup>520</sup>. Because of this any system featuring surgical requirements will necessarily be regarding some persons gender identities as not worthy of recognition as a cost of meeting societal standards.

It is also worth noting that surgical requirements do not impact everyone equally. For example depending on healthcare provisions in the jurisdiction, some people simply may be unable to afford them. This may function as a barrier to people with lower income levels, essentially restricting the right to gender recognition based on income. Similarly not all surgical procedures are equally available. Some may not be available within a reasonable distance that a person can practically travel, but in addition to this some surgeries are performed less often, and by a lower number of practitioners. For example according to a US survey, a much lower percentage of those identifying as "ftm" had had a phalloplasty than those identifying as "mtf" who had received a vaginoplasty<sup>521</sup>. This could be for a number of

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<sup>520</sup> Clinical intervention and embodied subjectivity: atypically sexed Children and their Parents, Katrina Roen, published as a part of *Critical Intersex*, Edited by Morgan Holmes, Ashgate publishing, 2009, page 22 paragraph 2

<sup>521</sup> For example in a US survey the majority of respondents had not had surgical interventions National Transgender Discrimination Survey Report on health and health care, Findings of a Study by the National Center for Transgender Equality and the National Gay and Lesbian Task Force By Jaime M. Grant, Ph.D., Lisa A. Mottet, J.D., and Justin Tanis, D.Min. With Jody L. Herman, Ph.D., Jack Harrison, and Mara Keisling October 2010, located at [www.thetaskforce.org/static\\_html/downloads/resources\\_and\\_tools/ntds\\_report\\_on\\_health.pdf](http://www.thetaskforce.org/static_html/downloads/resources_and_tools/ntds_report_on_health.pdf), accessed

reasons such as differing psychological needs or cultural exceptions, but it is worth noting that a phalloplasty is regarded as being a difficult surgery to perform, with good results being more rare than in the case of vaginoplasty<sup>522</sup>. As such surgical requirements may result in fewer people from the “ftm” demographic being able to access gender recognition, because the surgery they would require may be less desirable or more difficult to obtain. It is also worth noting that, even ignoring the specifics of individual procedures, surgeries are not something everyone can undergo, some people may be unable to do so due to various health conditions or religious beliefs. As such people with disabilities, those with conditions associated with ageing and certain religious groups may also find themselves unable to access gender recognition due to surgical requirements.

Related to the issue of surgical availability differing for various procedures is the issue of simply which surgeries would be required. Sex reassignment surgery, the term used by the requirements to change the gender marker on an Indian passport, can include a number of different procedures<sup>523</sup>. It is not specified which of these procedures are required, or if all of them are required, or if a person may choose any one procedure from those considered sex reassignment surgeries. These procedures are considered sex reassignment surgeries not because they alter a person’s sex definitively, but because they serve a therapeutic purpose in treating transgender persons and aiding their transition<sup>524</sup>. In fact the surgeries that can serve this purpose include some that the average person may not associate with sexual reassignment, such as liposuction. This is because, in the medical context, sex is determined holistically, with a number of factors being considered and weighed in a complex series of judgements that often require a panel of inter-disciplinary experts<sup>525</sup>. It is worth noting that this judgement is not an assessment of some objective and definitive truth, it is done with

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24/072018, pages 11-12

<sup>522</sup>Patient reported outcome measures and quality of life assessment in genital gender confirming surgery, Geolani W. Dy, Ian T. Nolan, James Hotaling, Jeremy B. Myers, *Transl Androl Urol*. 2019 Jun; 8(3): 228–240, Located at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6626309/>, accessed 28/12/2020

<sup>523</sup>Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People, 7th version, World Professional Association for Transgender Health, Located at [https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf) Accessed 24/07/2018 Page 57

<sup>524</sup>Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People, 7th version, World Professional Association for Transgender Health, Located at [https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf) Accessed 24/07/2018 Page 55

<sup>525</sup>*Sexing the Body: Gender Politics and the Construction of Sexuality*, Anne Fausto-Sterling, New York, NY: Basic Books, 2000.

reference to societal values, and seeks to determine how a person's body would best fit in with society, rather than being as simple as the common notion that sex can be objectively and definitively determined<sup>526</sup>. As such it is important to note that sex is complex, and while a surgery can alter the factors considered in sex determination, a single surgery cannot be considered determinative of sex. As such it is important that jurisdictions with surgical requirements for gender recognition consider exactly why they need the surgical requirement, and exactly what such a requirement will accomplish.

In addition to the general problems with surgical requirements an additional issue may be observed in the case of India. Because India, in its passports, recognises the existence of non-binary identities, how does the requirement for surgery interact with these identities? This is not made clear on the guidance available from Ministry of External Affairs. This poses an interesting question, as sexual reassignment surgeries serve to make a person's physical appearance more closely conform with the phenotype associated with the sex that matches their gender identity. This is relatively straightforward when one considers men and woman, the phenotypes associated with male and female bodies are well understood by most people. However, there is no such simple phenotype associated with non-binary gender identities. While some identities (such as eunuch or hermaphrodite) may have physical characteristics associated with them, many non-binary identities do not. As such, in the absence of clarification, it is difficult to know what a person who identifies with a non-binary identity, such as hijra or one of the other diverse identities referred to in the supreme court judgement, should do in order to have their identity recognised. It may be the case that surgical requirements are not viable in the case of individuals with non-binary identities.

These requirements have been challenged, in particular by Sandeepa Das, who sought to have her gender (female) recognised on her passport. She had sufficient evidence for other identity documents, but her application for a passport was denied, as she was told by officials that without proof of surgery she could not be recognised as a woman, but only as a man or as "belonging to the other sex"<sup>527</sup>, which presumably referred to the ability to be recognised on a

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<sup>526</sup> This is discussed in *Corbett v Corbett (Otherwise Ashley)* [1971] P. 8

<sup>527</sup> Transwoman faces gender hurdle at passport office, Subhro Niyogi, The Times of India, February 24 2018, located at <https://timesofindia.indiatimes.com/city/kolkata/transwoman-faces-gender-hurdle-at-passport-office/articleshow/63051985.cms>, accessed 26/07/2018, paragraph 2

passport as transgender<sup>528</sup>. She has challenged this decision, which will be reviewed, but a search did not reveal any updates on the case. In addition to demonstrating that these requirements are indeed implemented, this case may shed light on exactly how the passport office sees the transgender category. As there is no detailed guidance on the issue, this case seems to show that the category is seen as a larger “umbrella” category than the other two, serving as a sort of “other” section. From this case it seems that the third category is not only for individuals with non-binary identities, it is also used for individuals who have a binary identity, but have not adhered to the surgical requirements. This is somewhat interesting, as it indicates that male and female are seen as more than socially constructed genders. To be male or female under the current recognition model used by the Indian passport office one must not only indicate a certain gender identity, but also certain physical characteristics, whether they are acquired naturally or via surgery, with the “other” category being reserved for all those excluded from the two binary categories.

## Marriage:

India does not have a single marriage act, instead it has a number of acts which cover various types of religious marriages<sup>529</sup>, and the special marriage act which allows for “civil” marriage, without a religious component<sup>530</sup>. There is also no reported major Indian case regarding marriage with relation to transgender or intersex people, although *National Legal Services Authority v Union of India* does state that:

“Indian Law, on the whole, only recognizes the paradigm of binary genders of male and female, based on a person’s sex assigned by birth, which permits gender system, including

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<sup>528</sup> Transwoman faces gender hurdle at passport office, Subhro Niyogi, The Times of India, February 24 2018, located at <https://timesofindia.indiatimes.com/city/kolkata/transwoman-faces-gender-hurdle-at-passport-office/articleshow/63051985.cms>, accessed 26/07/2018

<sup>529</sup> The Hindu Marriage Act 1955, located at [https://highcourtchd.gov.in/hclsc/subpages/pdf\\_files/4.pdf](https://highcourtchd.gov.in/hclsc/subpages/pdf_files/4.pdf) accessed 28/07/2018, The Indian Christian Marriage Act 1872 located at <http://ncw.nic.in/acts/TheIndianChristianMarriageAct1872-15of1872.pdf> accessed 28/07/2018, The Parsi Marriage and Divorce Act 1936 located at <https://www.legalcrysal.com/act/134018/parsi-marriage-and-divorce-act-1936-complete-act> accessed 28/07/2018

<sup>530</sup> The Special Marriage Act-1954 located at <http://keralaregistration.gov.in/pearlpublic/downloads/The%20Special%20Marriage%20Act.pdf?tok=49sddh3ss34ff4> accessed 20/07/2018

the law relating to marriage, adoption, inheritance, succession and taxation and welfare legislations.”<sup>531</sup>

None of the marriage acts mention transgender or intersex people, but they do use gendered language which would suggest that they are intended to apply to male-female pairs, despite not stating that only such pairs are eligible for marriage. For example the Indian Christian Marriage Act does not explicitly state that only marriages between a male-female pair are valid, but it does refer to “the man intending to be married” and “the woman intending to be married”<sup>532</sup>. Similarly the Hindu Marriage Act refers to the ages of the bride and the bridegroom<sup>533</sup> and the Parsi Marriage and Divorce Act refers to the ages of the participants “if male” and “if female” although it does not suggest that one person in the marriage must belong to each category<sup>534</sup>, and the Special Marriage Act refers to the ages of “the male” and “the female”<sup>535</sup>. It is worth noting that these acts do not apply to all areas of India, for example the Special Marriage act does not apply to Jammu and Kashmir<sup>536</sup>.

Same sex marriages are not mentioned by any legislation, and section 377 of the Indian Penal Code states that:

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”<sup>537</sup>

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<sup>531</sup> National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 49

<sup>532</sup> The Indian Christian Marriage Act 1872 located at <http://ncw.nic.in/acts/TheIndianChristianMarriageAct1872-15of1872.pdf> accessed 28/07/2018, S60 (1)

<sup>533</sup> The Hindu Marriage Act 1955, located at [https://highcourtchd.gov.in/hclsc/subpages/pdf\\_files/4.pdf](https://highcourtchd.gov.in/hclsc/subpages/pdf_files/4.pdf) accessed 28/07/2018, S5

<sup>534</sup> The Parsi Marriage and Divorce Act 1936 located at <https://www.legalcystal.com/act/134018/parsi-marriage-and-divorce-act-1936-complete-act> accessed 28/07/2018, S3 (1) (c)

<sup>535</sup> The Special Marriage Act-1954 located at <http://keralaregistration.gov.in/pearlpublic/downloads/The%20Special%20Marriage%20Act.pdf?tok=49sddh3ss34ff4> accessed 20/07/2018, S4 (c)

<sup>536</sup> The Special Marriage Act-1954 located at <http://keralaregistration.gov.in/pearlpublic/downloads/The%20Special%20Marriage%20Act.pdf?tok=49sddh3ss34ff4> accessed 20/07/2018, S1 (2)

<sup>537</sup> The Indian Penal Code 1860, located at [www.wipo.int/wipolex/en/text.jsp?file\\_id=201592](http://www.wipo.int/wipolex/en/text.jsp?file_id=201592) accessed 28/07/2018, S377



This has been interpreted as criminalizing homosexual intercourse, and was upheld in 2013<sup>538</sup>, as it was decided that the court should defer to the legislature on the matter. However section 377 was found to be unconstitutional in 2018<sup>539</sup>.

Despite the lack of clarification regarding the meanings of gendered terms in the various marriage acts there were a small number of cases where transgender people were able to marry<sup>540 541</sup>. However, both of these cases occurred in areas which have their own gender recognition policies, which do not exist on the national level<sup>542</sup>. Clarification on a national level was given in 2019, with the ruling in *Arunkumar v. Inspector General of Registration* in the Madras High Court. The court stated not only that a marriage between a cis man and a trans woman was legitimate under the Hindu Marriage Act, but that to declare so was “merely stating the obvious.”<sup>543</sup>. The court also pointed out the injustice of the state of affairs at the time, when a person could be recognised as having a right to marry in Karnataka, but not in Tamil Nadu<sup>544</sup>. The reasoning deployed in this case concerned the interpretation of the word “bride”, which was defined as being a woman on her wedding day, which thus prompted the court to consider whether the word woman included trans women<sup>545</sup>. The court found that, as the constitution had been found to support the right of transgender people to be recognised according to their self-identified gender identity that the Hindu Marriage Act

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<sup>538</sup> Suresh Kumar Koushal and another v NAZ Foundation and others, Civil Appeal No.10972 of 2013, located at <https://www.sci.gov.in/jonew/judis/41070.pdf> accessed 16/08/2018

<sup>539</sup> Navtej Singh Johar v. Union of India W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016

<sup>540</sup> Kerala witnesses first transgender marriage, Indian Express news service, May 11 2018, located at <https://indianexpress.com/article/india/kerala-witnesses-first-transgender-marriage-5172148/> accessed 16/08.2018

<sup>541</sup> First transgender marriage registered in Karnatka, The Times of India, Niharika Alva, Jan 24 2018, located at <https://timesofindia.indiatimes.com/city/bengaluru/first-transgender-marriage-registered-in-state/articleshow/62632252.cms> accessed 16/08 2018

<sup>542</sup> Kerala and Karnataka

<sup>543</sup> Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019, judgment text located at [https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf\\_upload/pdf\\_upload-360185.pdf](https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/pdf_upload-360185.pdf), accessed 03/01/2021, paragraph 1

<sup>544</sup> Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019, judgment text located at [https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf\\_upload/pdf\\_upload-360185.pdf](https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/pdf_upload-360185.pdf), accessed 03/01/2021, paragraph 13

<sup>545</sup> Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019, judgment text located at [https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf\\_upload/pdf\\_upload-360185.pdf](https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/pdf_upload-360185.pdf), accessed 03/01/2021, paragraph 3

should be interpreted in that light<sup>546</sup>. This is particularly noteworthy due to the possible application of this case to other jurisdictions. The court stated that the word bride “cannot have a static or immutable meaning”<sup>547</sup> and that a statute must be interpreted in light of the legal system as it exists today. This of course may not be applicable to legal systems which have other conventions of statutory interpretation, but in jurisdictions where this reasoning is permissible it may allow for the incorporation of transgender rights into the law of marriage without legislative action.

The court also addressed the issue of surgery performed on intersex infants<sup>548</sup>. The court cited the *NLSA* case stating that no one should be forced to undergo medical procedures, including SRS or hormonal therapy, but ultimately found that surgeries on intersex infants constitute a more fundamental violation of section 32 (f) of the Indian constitution<sup>549</sup> which states that:

“The State shall, in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.”<sup>550</sup>

In reaching this conclusion the court cited an earlier decision which stated that the consent of the parents cannot fully substitute for the consent of the child, stating that “Ultimately, neither the father nor the mother can claim suzerainty over the child”<sup>551</sup> The court also cited a WHO (World Health Organisation) report<sup>552</sup> to demonstrate that “normalisation” surgeries

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<sup>546</sup> Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019, judgment text located at [https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf\\_upload/pdf\\_upload-360185.pdf](https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/pdf_upload-360185.pdf), accessed 03/01/2021, paragraph 10

<sup>547</sup> Ibid

<sup>548</sup> Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019, judgment text located at [https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf\\_upload/pdf\\_upload-360185.pdf](https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/pdf_upload-360185.pdf), accessed 03/01/2021, paragraph 16

<sup>549</sup> Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019, judgment text located at [https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf\\_upload/pdf\\_upload-360185.pdf](https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/pdf_upload-360185.pdf), accessed 03/01/2021, paragraph 19

<sup>550</sup> The Constitution of India, 1949, located at [https://www.india.gov.in/sites/upload\\_files/npi/files/coi\\_part\\_full.pdf](https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf) section 32 (f)

<sup>551</sup> S. Amutha Petitioner v C. Manivanna Bhupathy (2007) 2 CTC 97 paragraph 35

<sup>552</sup> Sexual health, human rights and the law, World Health Organisation 2015, Located at [https://apps.who.int/iris/bitstream/handle/10665/175556/9789241564984\\_eng.pdf?sequence=](https://apps.who.int/iris/bitstream/handle/10665/175556/9789241564984_eng.pdf?sequence=), accessed 03/01/2021

conducted on intersex infants are increasingly recognised as contrary to the best interests of the child<sup>553</sup>. Ultimately the court ordered the state government of Tamil Nadu to issue a Government Order prohibiting such surgeries on intersex infants<sup>554</sup>. The fact that this issue was addressed alongside the right of transgender persons to marry is noteworthy, as it demonstrates that intersex and transgender issues are still conflated to some degree in India. It appears, from reading the text of the judgement, that the court regarded both of these issues to be fundamentally about gender. While the court correctly identifies intersex as being related to physical characteristics<sup>555</sup>, it does so in order to state that an intersex person should not be modified surgically specifically so that they are free to discover their own gender identity<sup>556</sup>. This demonstrates that while the transgender and intersex communities face different specific problems, many of the fundamental issues at the core of intersex and transgender legal problems are often somewhat connected, as gender and sex are often connected in complex ways from a social and biological perspective<sup>557</sup>.

Bathrooms are often a focal point of discussions surrounding legal gender identity<sup>558</sup>, as bathrooms are often sex-segregated<sup>559</sup>. While there is no national law regarding the status of transgender or intersex people with regards to bathrooms, the government, through its ministry of drinking water and sanitation has issued guidance on gender issues in sanitation<sup>560</sup>. While these guidelines mostly address other issues, they do, under the heading

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<sup>553</sup> Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019, judgment text located at [https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf\\_upload/pdf\\_upload-360185.pdf](https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/pdf_upload-360185.pdf), accessed 03/01/2021, paragraph 18

<sup>554</sup> Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019, judgment text located at [https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf\\_upload/pdf\\_upload-360185.pdf](https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/pdf_upload-360185.pdf), accessed 03/01/2021, paragraph 25

<sup>555</sup> I Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019, judgment text located at [https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf\\_upload/pdf\\_upload-360185.pdf](https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/pdf_upload-360185.pdf), accessed 03/01/2021, paragraph 16

<sup>556</sup> Ibid

<sup>557</sup> Sex/gender: Biology in a social world, (Routledge series integrating science and culture, Anne Fausto-Sterling, 2012

<sup>558</sup> The toilet debate: Stalling trans possibilities and defending 'women's protected spaces.' Jones C, Slater J, The Sociological Review. 2020;68(4):834-851.

<sup>559</sup> Ibid

<sup>560</sup> Government of India, Ministry of drinking Water and Sanitation Swachh Bharat Mission (Gramin), Letter to The principal secretaries / secretaries in-charge of Rural Sanitation, All States/ UTs Regarding Guidelines on Gender issues in sanitation. 03/04/2017 Located at

of inclusivity, refers to the “third gender” and states that local authorities should “should make a conscious effort that they are recognised as equal citizens and users of toilets.” and goes on to state that “They should be allowed to use the facility of their choice (men or women) in community or public toilets.”<sup>561</sup>. While this document does only refer to the third gender, and does not use the word transgender, it is possible that, as these terms are often conflated, that this guidance could apply to all transgender people, and is not restricted to just those who identify with a non-binary gender. Similarly because these gender identities are often conflated with intersex people, it is possible that this instruction may also apply to them, provided that they identify with one of the identities referred to in India as “third gender” some of which are culturally understood to refer to an intersex identity. These guidelines are somewhat interesting, as while they occupy only a small section of the document, and are relatively simple, they represent a fairly strong statement on the rights of transgender people. These guidelines effectively sidestep the lack of national gender recognition legislation, granting rights fairly rapidly despite the apparent legislative deadlock. They also, in respect to the right to access sex segregated bathrooms, grant a right to self-identification, essentially stating that the government is unconcerned with physical sex, but instead wishes to grant rights based on gender identity, which is self-determined. In doing so it rejects arguments raised in a number of other jurisdictions, relating to claims that a transgender person remains essentially their gender assigned at birth, and thus should have their legal rights forever bound to that gender. It also rejects the notion that external verification is required to protect the users of bathrooms from persons lying about their identity in order to access the facilities for illegitimate purposes. These guidelines also reject the idea of separate bathrooms for transgender people, or adding additional gender-neutral facilities, as well as the notion of making all bathrooms gender neutral.

In addition to these guidelines there has been reporting of a judgement in which the government of Tamil Nadu was instructed by the court to take steps to build public toilets exclusively for “third genders”<sup>562</sup>. This judgement was made one month prior to the issue of

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<https://mdws.gov.in/sites/default/files/Guidelines%20on%20Gender%20issues%20in%20Sanitation.pdf>  
Accessed 02/08/2018

<sup>561</sup> Letter to The principal secretaries / secretaries in-charge of Rural Sanitation, All States/ UTs Regarding Guidelines on Gender issues in sanitation, Swachh Baharat Mission (Gramin), Ministry of drinking Water and Sanitation, Government of India, 03/04/2017, Located at

<https://mdws.gov.in/sites/default/files/Guidelines%20on%20Gender%20issues%20in%20Sanitation.pdf>  
Accessed 02/08/2018, paragraph 7

<sup>562</sup> Madras HC directs Tamil Nadu govt to build public toilets for transgender, Hindustan times, 4th April 2017,

the guidelines by the Ministry of Drinking Water and Sanitation. At time of writing the judgement text was not available, so it is unclear if this ruling has been impacted by the guidance, which contradicts it due to instructing that transgender people be permitted to choose which bathrooms to use rather than having specific bathrooms for their exclusive use.

## Prisons:

Prison policy is another area where the gender recognition mechanism used can have a great deal of impact on the welfare of those interacting with the system. While the national government does provide funding for prisons, it appears that there is not a national policy with regards to the housing of transgender or intersex prisoners. There is a national model prison manual<sup>563</sup>, however there is no obligation on states to adopt it, and it makes no mention of transgender people.

Documents on state level policies do not appear to be readily available, and due to time and scope limitations, obtaining them and evaluating them has proven out of the viable scope of this research. Data on transgender prisoners in India has in general proven hard to find, in part due to the lack of commitments to collecting data on trans prisoners<sup>564</sup>. Scholars have criticised this lack of data as contributing to the invisibility of transgender prisoners, which in turn contributes to their poor treatment, as problems cannot be solved if they are not observed<sup>565</sup>. However state level policies on these issues do exist in some cases. A number of

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located at <https://www.hindustantimes.com/india-news/madras-hc-directs-tamil-nadu-govt-to-build-public-toilets-for-transgenders/story-eVILHoEpkF5RiHwhEF05iL.html> accessed 27/08/2018

<sup>563</sup> Model Prison Manual, Government of India, Ministry of Home Affairs, New Delhi, 2016, Located at <https://www.mha.gov.in/MHA1/PrisonReforms/NewPDF/PrisonManual2016.pdf>, accessed 04/01/2021

<sup>564</sup> Lost Identity, Transgender persons inside Indian prisons, The Commonwealth Human Rights Initiative, 2020, Located at <https://www.humanrightsinitiative.org/download/1606377171Lost%20Identity%20Transgender%20Persons%20in%20Indian%20Prisons.pdf>, accessed 02/01/2020, page 41

<sup>565</sup> Confinement at The Margins: Preliminary Notes on Transgender Prisoners in India, Deekshitha Ganesan & Saumya Dadoo, 13 NUJS L. Rev. 3 (2020), Located at [nujslawreview.org/wp-content/uploads/2020/09/13-3-Ganesan-Dadoo-Confinement-at-the-Margins.pdf](https://nujslawreview.org/wp-content/uploads/2020/09/13-3-Ganesan-Dadoo-Confinement-at-the-Margins.pdf), accessed 04/01/2021

news reports have mentioned the creation of a cell block specifically for transgender inmates in Kerala at Viyyur central prison<sup>566</sup>. However the Kerala prisons website<sup>567</sup> makes no mention of this but does mention that a women's prison exists in Viyyur as well as the central prison<sup>568</sup>. Despite the unavailability of information regarding this cell block and the policies that must exist for such a cell block to operate, as to have a cell block for transgender inmates there must be a way of determining who is transgender, Kerala does make reference to gender in general in the legislation that governs its prisons. At the time of writing an English copy of the most recent legislation, the Kerala Prisons and Correctional Services (Management) Act 2014<sup>569</sup> was not available, the preceding legislation<sup>570</sup> was available in English. Section 38(2) of the 2010 act requires that offenders be classified as male or female and that prisoners receive separate housing based on this classification<sup>571</sup>. Section 38(3) goes on to require that some female prisoners be housed separately from other female prisoners if they have committed an offence under the Immoral Traffic (Prevention) Act 1956<sup>572</sup>. The Immoral Traffic (Prevention) Act 1956 contains a number of offences, mostly relating to prostitution<sup>573</sup>. While these offences do not directly refer to transgender people, it is worth noting that transgender people may be involved in sex work more often than their cis counterparts<sup>574</sup>, particularly if there is a high rate of discrimination against trans people in other fields of work where they live. This subsection is also worth mentioning as it requires separate housing of female prisoners based on the offence committed. While this may not seem initially relevant to transgender or intersex people it is worth noting that one of the commonly voiced objections to the recognition of a transgender persons gender identity in

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<sup>566</sup> Transgender inmates in Kerala jails to get their own blocks, Ramesh Babu, October 07 2015, Hindustan Times, located at <https://www.hindustantimes.com/india/transgender-inmates-in-kerala-jails-to-get-their-own-blocks/story-rCmoZYpWTEjvjpUbKuUJK.html> accessed 02/10/2018

<sup>567</sup> Kerala Prisons Website, Located at <http://www.keralaprison.gov.in/> accessed 02/10/2018

<sup>568</sup> Women Prison and Correctional Home, Kerala Prisons Website, Located at [http://www.keralaprison.gov.in/index.php?option=com\\_content&view=article&id=74&Itemid=79](http://www.keralaprison.gov.in/index.php?option=com_content&view=article&id=74&Itemid=79) accessed 02/10/2018

<sup>569</sup> Kerala Prisons and Correctional Services (Management) Act 2014, located at <https://kerala.gov.in/documents/10180/49d45b2b-9d85-49c8-b9bc-a2f19335346c> accessed 30/10/2018

<sup>570</sup> The Kerala Prisons and Correctional Services (Management) Act 2010, located at <http://www.lawsofindia.org/pdf/kerala/2010/2010KERALA9.pdf> accessed 30/10/2018

<sup>571</sup> The Kerala Prisons and Correctional Services (Management) Act 2010, located at <http://www.lawsofindia.org/pdf/kerala/2010/2010KERALA9.pdf> accessed 30/10/2018, s38(2)

<sup>572</sup> The Kerala Prisons and Correctional Services (Management) Act 2010, located at <http://www.lawsofindia.org/pdf/kerala/2010/2010KERALA9.pdf> accessed 30/10/2018, s38(3)

<sup>573</sup> Immoral Traffic (Prevention) Act, 1956, located at <https://indiacode.nic.in/bitstream/123456789/1661/1/1956104.pdf> accessed 30/10/2018

<sup>574</sup> "Study on Human Rights of Transgender as Third Gender", National Human Rights Commission, India (NHRC), 2018. Available at: [https://nhrc.nic.in/sites/default/files/Study\\_HR\\_Transgender\\_03082018.pdf](https://nhrc.nic.in/sites/default/files/Study_HR_Transgender_03082018.pdf), accessed 06/01/2021

prison may lead to male sex offenders to be housed alongside cis women who would then be at a higher risk of sexual violence<sup>575</sup>.

A recent report from the Commonwealth Human Rights Initiative examined the treatment of transgender prisoners in India<sup>576</sup>. The report found that not only can how transgender prisoners vary from state to state, but also between different jails in the same state<sup>577</sup>. This report observed that policies on the housing of transgender prisoners tend to fall into one of three categories: placement based on the gender on court warrant, placement based on advice by the chief medical officer, and those who have no policy at all on the placement of transgender prisoners<sup>578</sup>. In addition to these categories 6 states did not provide sufficient information for them to be placed in one of the other categories<sup>579</sup>. Out of those states which house prisoners according to medical advice the most common approach appears to be to treat transgender prisoners as a third gender, and are they are thus segregated from both cis male and cis female prisoners<sup>580</sup>. The remaining four states who house transgender prisoners according to medical advice classify prisoners as male or female according to their genitals and house them accordingly.

The prevalence of the use of medical advice in Indian prisons is interesting, as it may be in conflict with the NLSA ruling, which stated that everyone has a right to their self-identified gender<sup>581</sup>. It could be argued that this refers to the right to identify as transgender or not, and thus to be placed in a third gender category based on self-identification. However the NLSA

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<sup>575</sup> After Karen White: What is the government doing to make sure women in prison never get attacked by a male inmate ever again?, Fair Play for Women, December 2018, Located at <https://fairplayforwomen.com/prison-review/>, accessed 06/01/2021

<sup>576</sup> Lost Identity, Transgender persons inside Indian prisons, The Commonwealth Human Rights Initiative, 2020, Located at

<https://www.humanrightsinitiative.org/download/1606377171Lost%20Identity%20Transgender%20Persons%20in%20Indian%20Prisons.pdf>, accessed 02/01/2020

<sup>577</sup> Lost Identity, Transgender persons inside Indian prisons, The Commonwealth Human Rights Initiative, 2020, Located at

<https://www.humanrightsinitiative.org/download/1606377171Lost%20Identity%20Transgender%20Persons%20in%20Indian%20Prisons.pdf>, accessed 02/01/2020, page 43

<sup>578</sup> Lost Identity, Transgender persons inside Indian prisons, The Commonwealth Human Rights Initiative, 2020, Located at

<https://www.humanrightsinitiative.org/download/1606377171Lost%20Identity%20Transgender%20Persons%20in%20Indian%20Prisons.pdf>, accessed 02/01/2020, page 45

<sup>579</sup> Ibid

<sup>580</sup> Ibid

<sup>581</sup> National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 68

case has since been interpreted as giving a right to be treated as the gender which a person self identifies as, which was used to explain the interpretation of the word “bride” as including trans women<sup>582</sup>. Because of this it appears likely that the right to self-identified gender includes the right to be specifically recognised as the gender one identifies as, rather than being recognised as generically transgender. It will be interesting to see any future cases which challenge state and local rules regarding the housing of transgender prisoners.

News articles refer to a judgement in the Madras high court requiring the government of Tamil Nadu to alter its policy regarding open prisons, as the existing policy resulted in women and transgender prisoners being unable to be housed in these facilities<sup>583</sup>. At the time of writing the text of this judgement could not be located, nor could the policy in question. Details regarding gender policy could not be located on the Tamil Nadu prisons department website<sup>584</sup>.

## Concluding Remarks

Overall gender and sex recognition in India is characterised by its culture, history and diversity. India is a large country, so it should be no surprise that due to this and its history it is home to a diversity not only of ideas about gender but also diverse gender identities. This diversity is evident from various court judgements which make reference to the variety of identities present amongst the transgender community in India<sup>585</sup>. These judgements also repeatedly cite important cultural texts including poems and extracts from religious and other

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<sup>582</sup> Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019, judgment text located at [https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf\\_upload/pdf\\_upload-360185.pdf](https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/pdf_upload-360185.pdf), accessed 03/01/2021

<sup>583</sup> Make woman and transgender prisoners eligible to be inmates of open prisons, Madras HC tells TN govt, Srikanth D, September 11 2018 The Times of India, located at <https://timesofindia.indiatimes.com/city/chennai/make-woman-and-transgender-prisoners-eligible-to-be-inmates-of-open-prisons-madras-hc-tells-tn-govt/articleshow/65770546.cms> accessed 02/10/2018

<sup>584</sup> Tamil Nadu Prisons Website, Located at <http://www.prisons.tn.nic.in/> accessed 02/10/2018

<sup>585</sup> National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 12



influential texts<sup>586</sup>. Which can be seen as a demonstration that the unique cultures of India continue to play a role in the legal reasoning used in determining cases regarding transgender and intersex people. The fact that identities which have existed in Indian culture for centuries also demonstrates another factor which has contributed to the treatment of transgender and intersex people: the continuing impact of colonialism. It cannot be ignored that many elements of the Indian legal system which harmed the transgender community were introduced under British rule, particularly section 377<sup>587</sup>. The current national system introduced by the 2019 Act<sup>588</sup> can be seen as a blending of Indian cultural perspectives and the ongoing impacts of colonialism. It incorporates the western concept of gender being binary and related to biology in its surgical requirement for a person to be recognised as having a binary gender, as well as incorporating Indian cultural conceptions of gender in recognising a third status of “transgender”<sup>589</sup> which is distinct from the western concept of being transgender which is not normally understood as its own gender category, but which can incorporate non-binary gender categories. This understanding of “transgender” as a third category can be seen in the *NLSA* judgement, particularly in its reference to the Ramayana, in which Hijras are portrayed as a distinct group from men and women<sup>590</sup>.

The diversity of India can also be seen in the diversity of approaches taken to trans and intersex issues by the states. Each state is geographically unique and culturally distinct, and this is recognised by the federal system which allows each state to legislate in its own right on various issues. The states have taken a variety of approaches to transgender issues, from appearing to take no action at all, to establishing special policies to ensure equality and eliminate discrimination, as well as implementing their own gender recognition systems prior to the 2019 Act<sup>591</sup>. This has the democratic advantage of giving those who live in a jurisdiction the ability to make rules appropriate to their local culture and circumstance,

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<sup>586</sup> Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019, judgment text located at [https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf\\_upload/pdf\\_upload-360185.pdf](https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/pdf_upload-360185.pdf), accessed 03/01/2021, paragraphs 5 and 6

<sup>587</sup> The Indian Penal Code 1860, located at [www.wipo.int/wipolex/en/text.jsp?file\\_id=201592](http://www.wipo.int/wipolex/en/text.jsp?file_id=201592) accessed 28/07/2018, Section 377

<sup>588</sup> The Transgender Persons (Protection of Rights) Act, 2019 NO. 40 of 2019

<sup>589</sup> The Transgender Persons (Protection of Rights) Act, 2019 NO. 40 of 2019, Sections 7 and 4

<sup>590</sup> National Legal Services Authority v Union of India and others, writ petition (civil) NO. 400 of 2012 paragraph 13

<sup>591</sup> For example see Kerala Transgender Policy, 2015, G.O. No. 61/2015/SJD, Located at <https://kerala.gov.in/documents/10180/46696/State%20Policy%20for%20Transgenders%20in%20Kerala%202015>, accessed 05/01/2021

however it has also led to a lack of uniformity. While uniformity is not always desirable solely in its own right, it is important to remember that a lack of uniformity in the case of gender recognition means that individuals may lack legal rights based solely on where they happen to live or be born. This can be seen in the *Arunkumar* case, where the state of Kerala had failed to act in order to prevent surgeries on intersex infants, and was ordered by the court to fulfil this obligation<sup>592</sup>.

The approach taken by India to gender recognition can also serve as an example of the usefulness of the courts in enabling gender recognition, as well as some of the disadvantages of that approach. The *NLSA* ruling is an example of how a court can prompt the adoption of gender recognition measures in the absence of legislative action. Additionally the fact that it was a ruling on constitutional interpretation arguably means the judgement is stronger than any prior legislative action would have been, as it cannot be as easily reversed as legislation could be repealed. However it also demonstrates how while the courts can be a progressive force, they cannot act as a replacement for the legislature. Prior to the 2019 Act India was in a situation where it was obliged to recognise the gender identities of transgender people, but had no legislative framework to guide how this should be done. This led to gender recognition being implemented in a somewhat piecemeal fashion, with different government bodies implementing different rules which were inconsistent with each other as well as being different from the approaches adopted by the states. While the courts did act during this period to reduce the injustices caused by the failure of various bodies to implement gender recognition of policies that were conscious of the needs of transgender period<sup>593</sup>, this was an attempt to remedy individual injustices caused by a lack of clear national policy and legislation, not a replacement for it. In most circumstances the courts must wait for an injustice to have already occurred, they cannot act to prevent future problems in the way that legislation can. Similarly the requirement to have sufficient funds to pursue a court case can mean that justice via the courts is only accessible to a fortunate few.

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<sup>592</sup> *Arunkumar v. Inspector General of Registration*, WP(MD) No. 4125 of 2019, judgment text located at [https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf\\_upload/pdf\\_upload-360185.pdf](https://drive.google.com/viewerng/viewer?url=https://www.livelaw.in/pdf_upload/pdf_upload-360185.pdf), accessed 03/01/2021

<sup>593</sup> Madras HC directs Tamil Nadu govt to build public toilets for transgenders, *Hindustan times*, 4th April 2017, located at <https://www.hindustantimes.com/india-news/madras-hc-directs-tamil-nadu-govt-to-build-public-toilets-for-transgenders/story-eVILHoEpkF5RiHwhEF05iL.html> accessed 27/08/2018

## The legal situation in the UK

### The UK law on gender recognition for transgender people

The UK does not currently recognise non-binary genders or intersex status in any legal document. It does, however, attempt to address the existence of transgender and intersex people in the legal system to some degree. There have also been recent calls to introduce legal recognition of non-binary gender and sex identities<sup>594</sup>. This chapter will examine the

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<sup>594</sup> Transgender equality, first report of the session 2015-2016 HC 390, House of commons Women and Equalities Committee, Published on 14 January 2016, Located at <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>

current UK law applicable to transgender individuals and gender recognition, and the references within that law to intersex people with a view to examining how the law on this issue in the UK may change in the future. It is worth noting that the UK law on the subject has been highly influential on the law in other jurisdictions particularly former colonies<sup>595</sup>. Examining its development and current structure can be a useful aid in understanding the law in a large number of jurisdictions and is the “common ancestor” of the laws of the other jurisdictions examined in this thesis.

The law on gender recognition in the UK comes, for the most part, from the Gender Recognition Act 2004<sup>596</sup>. This act interacts with the Equality Act 2010<sup>597</sup>, and has also been the subject of case law. An understanding of which is necessary to understand the position of the UK with regards to gender recognition. There are also gender recognition measures in other areas of the law, such as with regards to passports and prisons. For the sake of clarity this chapter will begin by exploring the case law which led to the Gender Recognition Act, and then address the relevant case law, followed by other aspects of the law, in particular the Equality Act, the Marriage (same sex couples) Act and the treatment of transgender prisoners, as well as the recent review of the law relating to transgender people.

One of the first major cases concerning the rights and legal status of transgender people in the UK was *Corbett v Corbett*<sup>598</sup>. This case, while it concerned the validity of a marriage, impacted every aspect of the legal recognition of transgender people. It was also hugely influential outside the UK and gave voice to many of the arguments still used to deny the rights of transgender people.

The case concerned April Ashley and Arthur Cameron Corbett, who, having met in November 1960 were involved in a wedding ceremony in Gibraltar on September 10<sup>th</sup> 1963<sup>599</sup> following the termination of Arthur Cameron Corbett's first marriage<sup>600</sup>. Their relationship ended just 14 days after the ceremony<sup>601</sup>. April Ashley was a transgender woman assigned male at birth had been taking hormonal treatment since 1956<sup>602</sup> and had undergone a “sex change operation” in May 1960<sup>603</sup>. Arthur Cameron Corbett was aware of this since

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<sup>595</sup> For example it is discussed in *M v. M*, [1991] NZFLR 337 para 35

<sup>596</sup> Gender Recognition Act 2004

<sup>597</sup> Equality Act 2010 c.15

<sup>598</sup> *Corbett v Corbett* (otherwise Ashley) (No.1) [1971] P. 83

<sup>599</sup> *Corbett v Corbett* (otherwise Ashley) (No.1) [1971] P. 83, at 98 para 3

<sup>600</sup> *Corbett v Corbett* (otherwise Ashley) (No.1) [1971] P. 83, at 93 para 2

<sup>601</sup> *Ibid*

<sup>602</sup> *Ibid*

<sup>603</sup> *Corbett v Corbett* (otherwise Ashley) (No.1) [1971] P. 83, at 90 para 3

their first meeting in November 1960<sup>604</sup>. He argued that the marriage was void, as he claimed April Ashley was a man<sup>605</sup> and that the marriage had not been consummated<sup>606</sup>.

The court found that biological sex is the key component in marriage, as it was the cornerstone of the family and therefore required “natural hetero-sexual intercourse”<sup>607</sup>. The court did not seek to make a pronouncement of a person’s “legal sex”, but instead found that marriage in particular, due to it requiring heterosexual intercourse, must have biological criteria for determining who is a man or woman for the purposes of marriage<sup>608</sup>. The court found that in this case April Ashley was always male, and this had not been changed by surgery or hormones<sup>609</sup>. This was based on the reasoning that sex is fixed at birth, based largely on chromosomal sex, and that any surgery or other treatment in this case was online a “pastiche of femininity”<sup>610</sup> rather than the genuine article. This was because a person could not change their chromosomal sex. As such it was found that a transsexual could not marry. How a person experienced their own gender and was treated by society was found irrelevant<sup>611</sup>, and that it was sex which was essential in marriage, and that this could not truly be changed after birth.

A significant portion of the judgement is spent discussing intersex conditions. While the judgement does not say what the result would have been had April Ashley been found to be intersex, the issue is discussed in the context of attempts to confirm what her sex should be considered to be. Three interesting features of the case can be found in this section of the judgement. The first being that two of the five expert witnesses said that they would classify a transsexual to be a subtype of intersex person<sup>612</sup>, a finding which perhaps foreshadows the finding in *Re: Kevin [2001]* that a transsexual could be considered to be intersex on the grounds of “brain sex”<sup>613</sup>. The second interesting feature of this section is that overall three of the five experts said that they would classify April Ashley as intersex, yet the court did not

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<sup>604</sup> Corbett v Corbett (otherwise Ashley) (No.1) [1971] P. 83, at 91 para 2

<sup>605</sup> Corbett v Corbett (otherwise Ashley) (No.1) [1971] P. 83, at 98 para 3

<sup>606</sup> Ibid

<sup>607</sup> Corbett v Corbett (otherwise Ashley) (No.1) [1971] P. 83, at 105 para 2

<sup>608</sup> Ibid

<sup>609</sup> Corbett v Corbett (otherwise Ashley) (No.1) [1971] P. 83, at 109 para 1

<sup>610</sup> Ibid

<sup>611</sup> Corbett v Corbett (otherwise Ashley) (No.1) [1971] P. 83, at 106 para 2

<sup>612</sup> Ibid

<sup>613</sup> Re Kevin (validity of marriage of transsexual)[2003] FamCA 94 paragraphs 183 - 186

find this convincing, choosing instead to classify her as male on the grounds of chromosomal and gonadal sex at birth<sup>614</sup>. This was in part due to a lack of evidence for any specific intersex condition, and an apparent disregard for other factors such as hormonal factors and the brain, preferring to focus on chromosomes and the presence of testicles.

The third feature is less a feature of the case itself, but rather a feature of how gender was recognised prior to the case. When discussing the view that transsexuals may be a type of intersex person it is mentioned that two of the experts called upon in the case had been successful in having patients recognised as female by the Ministry of Labour for the purposes of national insurance<sup>615</sup>. This is noteworthy as this seems to have been prior to any formal system of gender recognition existing in the form of primary or secondary legislation or as common law, and prior to any available evidence of formal policy for allowing a transgender person to alter their recognised gender. However, in addition to being an interesting example of gender recognition occurring prior to any formal framework, the recognition of these patients prior to any legislation and the way the court discusses how gender interacts differently with various areas of the law provide a useful framework for understanding the entirety of how legal gender recognition has been addressed in the UK and related jurisdictions.

While Ormrod J. does state that this case is concerned only with sex “for the purposes of marriages”<sup>616</sup> he does give an account of how the law interacts with sex in general. This account does not claim that one particular method of determining a person’s sex or gender should be authoritative in all cases, but rather that the method used will vary and be determined by the purpose for which the person’s gender or sex is being recognised. He states that:

“For the limited purposes of this case, legal relations can be classified into those in which the sex of the individuals concerned is either irrelevant, relevant or an essential determinant of the nature of the relationship. over a very large area the law is indifferent to sex. It is irrelevant to most of the relationships which give rise to contractual or tortious rights and

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<sup>614</sup> Corbett v Corbett (otherwise Ashley) (No.1) [1971] P. 83, at 103 paras 3 and 4

<sup>615</sup> Corbett v Corbett (otherwise Ashley) (No.1) [1971] P. 83, at 99 para 2

<sup>616</sup> Corbett v Corbett (otherwise Ashley) (No.1) [1971] P. 83, at 106 para 1

obligations, and to the greater part of the criminal law. In some contractual relationships, e.g., life assurance and pensions schemes, sex is a relevant factor in determining the rate of premium or contributions. It is relevant also to some aspects of the law regulating conditions of employment and to various state-run schemes such as national insurance, or to such fiscal matters as selective employment tax. It is not an essential determinant of the relationship in these cases because there is nothing to prevent the parties to a contract of insurance or a pension scheme from agreeing that the person concerned should be treated as a man or as a woman, as the case may be. Similarly, the authorities, if they think fit, can agree with the individual that he shall be treated as a woman for national insurance purposes, as in this case. On the other hand, sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural hetero-sexual intercourse is an essential element.”<sup>617</sup>

This sets out three categories into which laws may fall based on how they interact with sex. The first category, those laws which do not interact with sex at all at least not explicitly in their text, while they make up the bulk of the law, are largely irrelevant for the purposes of this discussion. The important aspect of this paragraph is that it divides the laws that do care about sex into two categories, those laws which regard gender as “relevant” and those laws for which sex is “an essential element”.

The “relevant” category is noteworthy because it is recognised as being essentially mutable and negotiable. Ormrod J correctly identifies that legal relationships exist which care about sex, but for which the exact meaning of sex may be variable or negotiable. For example, if a bank were to open a special account for women with a higher interest rate to encourage women to save and develop increased financial independence<sup>618</sup>, it would be up to them to determine who they consider to be within the category of “women”. Ormrod J goes on to say that it is within the power of “the authorities” to define “woman” however they would like for national insurance purposes<sup>619</sup>. This can be seen as an acknowledgement that terms relating to

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<sup>617</sup> *Corbett v Corbett (Otherwise Ashley)* [1971] P. 83, at 105 para 2

<sup>618</sup> Ignoring, for the purposes of this hypothetical, whether this would actually be possible under modern equality law.

<sup>619</sup> *Corbett v Corbett (Otherwise Ashley)* [1971] P. 83 At 105 para 2

sex or gender such as “woman” can be defined in a variety of ways, not only in private contractual relationships, but also in legislation applicable to the population at large. It is due to the existence of this category that the patients mentioned elsewhere in the judgement were able to have their gender recognised for the purpose of national insurance. The distinguishing feature being that, in the view of Ormrod J. national insurance and marriage relate to gender and sex in fundamentally different ways, with national insurance capable of change in how it recognises gender, but with marriage belonging to the much more inflexible “essential” category.

The “essential” category is the true focus of the judgement, but is a much smaller category than the previous two. In the judgement Ormrod J. only gives a few examples of laws which fall within this category:

“There are some other relationships such as adultery, rape and gross indecency in which, by definition, the sex of the participants is an essential determinant”<sup>620</sup>

The judgement also places marriage within this category as “It is the institution on which the family is built, and in which the capacity for natural hetero-sexual intercourse is an essential element.”<sup>621</sup> Ormrod J. goes on to talk about how in order to be a woman for the purpose of marriage one must be capable of “performing the essential role of a woman in marriage.”<sup>622</sup> which means, according to Ormrod J, having “female” gonads, chromosomes and genitals<sup>623</sup>. While a number of subsequent cases have disagreed with this characterisation of marriage<sup>624</sup>, the focus of this thesis is not on marriage itself, but on the nature of the category of laws for which sex is deemed “essential”.

Ormrod J. draws a distinction in the judgement between sex and gender<sup>625</sup>. When he states that sex is an essential component of some laws, it appears, particularly given the examples of this category he invokes, that he means simply that these laws necessarily relate to a

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<sup>620</sup> Corbett v Corbett (Otherwise Ashley) [1971] P. 8 At 106

<sup>621</sup> Corbett v Corbett (Otherwise Ashley) [1971] P. 8 At 105

<sup>622</sup> Corbett v Corbett (Otherwise Ashley) [1971] P. 8 At 106

<sup>623</sup> Ibid

<sup>624</sup> For example M v. M, [1991] NZFLR 337

<sup>625</sup> Corbett v Corbett (Otherwise Ashley) [1971] P. 83 At 107



person's physical status. Because of this the Corbett case can be regarded, not as a case about legal gender, but as a case rejecting the very concept.

Since the Corbett case the legal nature of marriage has changed. As a legal relationship it is no longer exclusively or necessarily hetero-sexual<sup>626</sup>. Gross indecency as an offence no longer exists<sup>627</sup>. Rape is defined with regard to the possession of a penis and a vagina<sup>628</sup>, and as such does not require any judgement as to a person's sex, which can be complex and multi-faceted<sup>629</sup>. Adultery is the sole example cited by Ormrod J. which remains, under the law exclusively heterosexual<sup>630</sup>. Because of this, as well as modern developments in gender recognition law, it is possible that this category no longer exists in modern law.

For modern purposes, the major category of legal gender referred to Corbett is that where sex is "relevant" but not "essential". Which is defined by being negotiable and as being definable in any number of ways as determined by the parties involved. This paints a picture of the system of legal gender in the UK which is distinguished by its versatility but also it also by its possible conflicts. While a transgender person could, in theory, have their gender recognised in virtually all aspects of life, in reality this would have to have been negotiated separately in virtually every area of life. This poses a number of difficulties for the trans person in question.

Firstly, such a negotiation is not the same as a commercial negotiation, in which there is give and take. Gender recognition is usually not a case of simply agreeing to pay more to have one's gender recognised. It is often more akin to a measuring than a negotiation, in which rather than offering something in exchange, the individual and their characteristics are measured against a set of individual or social standards to see if they "measure up" and thus can be said to fit within the category they seek to be recognised as a member of. Because the standards by which a person is "measured" in this way are often social standards, which have

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<sup>626</sup> Marriage (Same Sex Couples) Act 2013 Section 1(1)

<sup>627</sup> Sexual Offences Act 2003 schedule 7

<sup>628</sup> Sexual Offences Act 2003 section 1(1)

<sup>629</sup> For an example of this complexity see Intersex: Concept of multiple sexes is not new, Anne Fausto-Sterling, *Nature*, 3/18/2015, Vol.519(7543), pp.291-291

<sup>630</sup> Matrimonial Causes Act 1973 Section 1(6)

a degree of uniform standards, the transgender person seeking recognition can be seen to be the party who has much less power in this situation. These standards may be difficult to “negotiate against” for the individual in question due to the extreme power imbalance of the individual in conflict with a series of social standards that may be founded on ignorance, misunderstanding or prejudice. In such a system progress may be very difficult for any individual to obtain.

Secondly the diversity of standards involved and the need to prove one’s gender for each particular purpose creates a number of practical problems. This is in addition to being difficult to negotiate social concepts of gender that may be exclusionary. Not only can this require a significant amount of effort for an individual, but the very fact that different forms of recognition can contradict each other can cause practical problems, even though notionally they should not as they all relate to different purposes and thus do not necessarily refer to the same thing, despite all referring to gender or sex. As pointed out in later cases<sup>631</sup> a diversity of standards, many of which are backed up by social attitudes which can be resistant to change means that a person must necessarily reveal themselves as transgender to the relevant authority for each purpose, often a private individual. This places the person seeking recognition in a vulnerable position where they can be subject to social shaming and discrimination. In addition to this, having documents that recognise different genders makes it easier for a person to be revealed to be transgender against their wishes, placing them in a similar vulnerable position<sup>632</sup>. Because of this the situation where the vast majority of gender recognition occurs in the “relevant but not essential” category where recognition is independently negotiated for each purpose continued to cause difficulties for transgender people. Subsequent cases focus on the injustices caused by not only lacking recognition for specific purposes but additionally on the difficulties caused by having to “negotiate” against social ideas of gender independently for each purpose.

While it is important to mention Corbett for the purposes of understanding the background of gender recognition law, and a number aspects of its functioning, its impact on modern law is not merely structural. While the case has been criticised<sup>633</sup>, and the Gender Recognition Act

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<sup>631</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 77

<sup>632</sup> Ibid

<sup>633</sup> A v Chief Constable of West Yorkshire [2004] UKHL 21 paragraph 3

now provides a path to recognition for the purpose of marriage<sup>634</sup>, Corbett remains the current law in certain situations, as can be seen in the recent case of *P v P*<sup>635</sup>. This was particularly relevant before the introduction of marriage equality in the UK<sup>636</sup>, as it remained the case that without a gender recognition certificate a person's gender for that purpose remained their gender assigned at birth<sup>637</sup>.

After Corbett the next case to address the issue of "legal gender" was *R v Tan*<sup>638</sup>. It is different from the vast majority of other cases in this area because it does not relate to birth certificates or gender recognition on any other official document. Instead it addresses the issue of what a person's gender or sex should be for the purpose of the criminal law. While it does not relate to "gender recognition" in terms of the idea of a uniform, singular process of recognition as future cases would, it follows Corbett in examining the issue of gender recognition with regard to a specific purpose.

The issue at hand in *R v Tan* was the conviction of Gloria Gina Greaves for keeping a disorderly house and of being a man living on earnings of prostitution. She appealed on the basis that while "biologically male" she had been "psychologically and socially female for more than 18 years she ought to have been deemed to be female"<sup>639</sup>. While the offence at hand no longer exists, so in the strictest sense may not be applicable to modern law, the reasoning for the decision gives insight to the attitude adopted following *Corbett v Corbett* and has been cited in more modern cases as being authoritative on the issue of "legal gender"<sup>640</sup>. The reasoning in the case is best encapsulated by the following extract from the judgment text:

"We reject this submission without hesitation. In our judgement both common sense and the desirability of certainty and consistency demand that the decision in *Corbett v. Corbett* should apply for the purpose not only of marriage but also for a charge under section 30 of the

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<sup>634</sup> Gender Recognition Act 2004

<sup>635</sup> *P v P* (Transgender Applicant for Declaration of Valid Marriage) [2019] EWHC 3105 (Fam)

<sup>636</sup> Marriage (Same Sex Couples) Act 2013

<sup>637</sup> *J v C* (Void Marriage: Status of Children) [2006] 3 W.L.R. 876

<sup>638</sup> *Regina v Tan and Others* [1983] 3 W.L.R. 361

<sup>639</sup> *Regina v Tan and Others* [1983] 3 W.L.R. 361 at 1055

<sup>640</sup> *Chief Constable of The West Yorkshire Police v A and Another* (No 2) [2002] I.C.R. 552 paragraph 3

Sexual Offences Act 1956 or section 5 of the Sexual Offences Act 1967. The same test would apply also if a man had indulged in buggery with another biological man. That *Corbett v Corbett* would apply in such a case was accepted on behalf of the appellant. It would, in our view, create an unacceptable situation if the law were such that a marriage between Gloria Greaves and another man was a nullity, on the ground that Gloria Greaves was a man; that buggery to which she consented with such other person was not an offence for the same reason; but that Gloria Greaves could live on the earnings of a female prostitute without offending against section 30 of the Act of 1956 because for that purpose he/she was not a man and that the like position would arise in the case of someone charged with living on his earnings as a male prostitute.”<sup>641</sup>

Unfortunately this extract is the sum of the discussion on the concept of legal gender in *R v Tan*, and while it clearly states that having a person’s “legal genders should be the same for the purpose of marriage as in *Corbett* as for the criminal law, but does not state why these two purposes should be consistent with each other. While the desire for consistency is understandable, it seems to fundamentally contradict the reasoning in *Corbett* to state that all purposes should use the same standard of legal sex/gender as the “essential” category discussed in *Corbett*. However, it may be that this extract is simply stating the view that sexual offences should be seen to be in the “essential” category, which corresponds with the short discussion of that category in *Corbett*<sup>642</sup>. It is not particularly clear how *R v Tan* should be read in this regard. While the section of the judgement regarding legal gender only mentions the specific charge at hand and buggery, both being sexual offences, the judgement has since been cited in arguments that claim that it extended the idea of an unchanging “legal gender” assigned at birth to all of the criminal law<sup>643</sup>.

Following *R v Tan* the predominant legal argument seems to shift from a focus on what a person’s legal gender is for a specific purpose to focus on the idea of whether the UK should introduce a system that would allow a transgender person to have a single legal gender recognised “for all purposes” due to the difficulties mentioned previously associated with a person having many legal genders. The possibility that a person may have a number of

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<sup>641</sup> Regina v Tan and Others [1983] 3 W.L.R. 361 At 1064

<sup>642</sup> Corbett v Corbett (Otherwise Ashley) [1971] P. 8 At 106

<sup>643</sup> Chief Constable of The West Yorkshire Police v A and Another (No 2) [2002] I.C.R. 552 paragraph 3

equally valid but differing legal genders would not be addressed again by the House of Lords or Court of Appeal until 19 years later in the case of *Chief Constable of The West Yorkshire Police v A*<sup>644</sup>.

Following *Corbett* and *R v Tan* the UK was taken to the European Court of Human Rights regarding the state of its gender recognition law in the case of *Rees v UK*<sup>645</sup> in 1987. This case concerned a trans man, who alleged that the UK had violated articles, 8 and 12, the right to a private and family life and the right to marriage. This was due to the UK failing to have any system for altering a person's sex on their birth certificate, and the fact that due to *Corbett v Corbett* a trans man would not be considered a man for the purposes of marriage<sup>646</sup>.

The main arguments raised in this case were that the failure to issue a new birth certificate caused humiliation and prevented full integration of transgender people into society<sup>647</sup>. The court was not persuaded by this, instead pointing out that many of the obligations under the Convention are negative obligations, which oblige a state to refrain from taking a specific action. However, if there were to be an obligation to have a coherent system of gender recognition, or even an obligation to have any system at all, this would be a positive obligation, and thus would require more evidence to persuade the court that this was required by the convention<sup>648</sup>. With regards to the alleged breach of article 8, the court found that there was none. This was because there was no coherent standard among the member states as to gender recognition, and the UK would, if an obligation was found to be present under article 8, need to use resources to reform its entire system, which would affect other citizens. The court found that only recognising a transgender person as their "new" gender for certain purposes was sufficient, as incidental alterations to the existing systems was all that was required to "strike a fair balance"<sup>649</sup> between a person's right to have their gender recognised and the need for the state to use its resources in such a way as to benefit as many of its citizens as possible.

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<sup>644</sup> *Chief Constable of The West Yorkshire Police v A and Another* (No 2) [2002] I.C.R. 552

<sup>645</sup> *Rees v United Kingdom* (A/106) [1987] 2 F.L.R. 111

<sup>646</sup> *Rees v United Kingdom* (A/106) [1987] 2 F.L.R. 111 at 31 and 32

<sup>647</sup> *Rees v United Kingdom* (A/106) [1987] 2 F.L.R. 111 at 34

<sup>648</sup> *Rees v United Kingdom* (A/106) [1987] 2 F.L.R. 111 at 37

<sup>649</sup> *Rees v United Kingdom* (A/106) [1987] 2 F.L.R. 111 at 42

With regards to article 12 the court dealt with the issue briefly, in two paragraphs, stating that the right under article 12 under the convention referred only couples of opposite biological sexes, with no justification or explanation for this interpretation offered<sup>650</sup>.

The same issue was addressed again by the European Court of Human Rights in *Cossey v United Kingdom* [1991]<sup>651</sup>. As in the Rees case, the relevant articles were 8 and 12. However, the *Cossey* and *Rees* cases are somewhat different. *Cossey* focused more on marriage and involving a marriage that actually occurred, whereas marriage was mentioned only in *Rees* as one of the rights the failure to recognise transgender people interfered with. However, despite these differences the court found that the facts were not sufficiently different to mean the cases should be distinguished from each other, it also pointed out that it is not bound by its previous decisions<sup>652</sup>. The court went on to immediately state that its opinion was unchanged from that in the *Rees* case<sup>653</sup>. With regards to article 12 the court noted that there had been developments since the *Rees* case<sup>654</sup>, but maintained that article 12 only created an obligation to recognise marriage between people of opposite biological sexes<sup>655</sup>.

Despite this judgement the precursors to change may be seen in this case, particularly in the dissenting opinions of Judges Palm, Foighel and Pekkanen, who believed that there had been violations of article 8 and 12. This is because the failure to provide a system to alter birth certificates put transgender people in an “impossible situation” where they either had to disclose their transgender status or conceal the reality of their lives<sup>656</sup>. This dissent also pointed out that biology was a poor criteria as, following surgery, Ms *Cossey* could not be biologically considered a woman either, so the only solution that seemed viable was the compassionate solution of considering her a woman for the purposes of marriage. The dissent

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<sup>650</sup> *Rees v United Kingdom* (A/106) [1987] 2 F.L.R. 111 at 49 and 50

<sup>651</sup> *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622

<sup>652</sup> *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622 paragraphs 32 to 35

<sup>653</sup> *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622 paragraphs 36 to 42

<sup>654</sup> *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622 at paragraph 46

<sup>655</sup> *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622 paragraphs 43 to 48

<sup>656</sup> *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622 paragraph 4 of the dissent located at 663 para 2

also dismissed the argument that marriage is essentially procreative, pointing out that men and women who cannot bear children are still permitted to marry<sup>657</sup>.

Judge Martens disagreed with the majority, but on slightly different grounds. Judge Martens pointed out that the *Reese* case was decided on the grounds that to require a means of altering the register of births would impose a positive obligation on the UK. However, Martens points out that the claim in *Reese* should be seen as being “the existence of this system that recognises only biological sex is a violation of article 8” rather than the construction that the court seemed to use of “the lack of existence of a system of altering the registry of births is a violation of article 8”<sup>658</sup>. Using this alternate construction, it can be seen that the *Reese* case can be constructed as not requiring a positive obligation, but as requiring states to refrain from implementing systems which are based solely on biological sex. As such the *Reese* case may have been wrongly decided. This dissent also points out that the argument that article 12 should be interpreted as only applying to “traditional marriage” and therefore requiring that the participants of a marriage protected by article 12 be of opposite biological sexes is essentially an appeal to the intent of the legal drafters. This may be a flawed basis for an argument, as the convention should be seen as a living instrument, and the intent of the legal drafters may well be a flawed guide, as the existence of transgender people was not an issue the drafters of the convention would have likely been aware of<sup>659</sup>. Martens also refers to the reliance on chromosomal sex in *Corbett* as “arbitrary and unreasonable”<sup>660</sup> as it ignores the effects of sexual reassignment surgery on a person’s body.

After *Cossey* the issue was next examined by the ECHR in *B v France*<sup>661</sup>. This case is notable, as it was the first time the court recognised a breach of article 8 due to the failure to provide gender recognition mechanisms. The case concerned a transgender woman who had undergone hormone therapy and sexual reassignment surgery<sup>662</sup> who alleged a violation of article 8 due to the fact that refusing to alter her birth certificate violated her privacy, as she

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<sup>657</sup> *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622 paragraph 5 of the dissent located at 665 para 2

<sup>658</sup> *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622 paragraph 3.4 of the dissent located at 650 para 1

<sup>659</sup> *Cossey v United Kingdom* (1991) 13 E.H.R.R. 622 at 4.4.2 of the dissent, located at 656, paragraph 3

<sup>660</sup> *Ibid*

<sup>661</sup> *B v France* (A/232-C) (1993) 16 E.H.R.R. 1

<sup>662</sup> *B v France* (A/232-C) (1993) 16 E.H.R.R. 1 at paragraph 11

would have to disclose the fact that she was transgender to people she may not wish to disclose that information to<sup>663</sup>. The French court of appeal had denied her claim because:

“... contrary ... to Mr. [B.'s] contention, his present state is not 'the result of irreversible innate factors existing before the operation and of surgical intervention required by therapeutic necessities,' nor can it be considered that the treatment voluntarily undergone by Mr. [B.] led to the disclosure of his hidden true sex, but on the contrary it indicates a deliberate intention on his part without any other treatment having been tried and without the operations having been necessitated by Mr. [B.'s] biological development.”<sup>664</sup>

Further appeals had been unsuccessful. While the court reiterated its statements in *Rees* and *Cossey* that there was not yet sufficient consensus among member states and that the science on the issue was “in a state of flux”<sup>665</sup>. However, the court found that the legal situation in France was significantly different from the UK<sup>666</sup> and this justified finding France to be in breach of article 8. Of particular relevance was the fact that the French system did not allow the applicant to change her name<sup>667</sup>, and that the French system was not designed to be a historical record of a person’s status at birth, but did allow amendments and alterations in other situations through a person’s life to reflect their current identity<sup>668</sup>. The court found that those factors, in addition to the increased severity and frequency of inconveniences caused by needing to verify ones gender on a large number of documents were sufficient to distinguish the case from *Rees* and *Cossey* and find a violation of article 8<sup>669</sup>

Following this the issue of treatment of transgender people in the UK was addressed in *P v S and Cornwall CC*<sup>670</sup>. Although this case was not directly concerning gender recognition, the issue was touched upon and the previous ECHR cases on the matter were referenced. This

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<sup>663</sup> B v France (A/232-C) (1993) 16 E.H.R.R. 1 at paragraph 13

<sup>664</sup> B v France (A/232-C) (1993) 16 E.H.R.R. 1 at paragraph 15

<sup>665</sup> B v France (A/232-C) (1993) 16 E.H.R.R. 1 at paragraph 48

<sup>666</sup> B v France (A/232-C) (1993) 16 E.H.R.R. 1 at paragraph 51

<sup>667</sup> B v France (A/232-C) (1993) 16 E.H.R.R. 1 at paragraph 58

<sup>668</sup> B v France (A/232-C) (1993) 16 E.H.R.R. 1 at paragraph 55

<sup>669</sup> B v France (A/232-C) (1993) 16 E.H.R.R. 1 at paragraph 63

<sup>670</sup> P v S and Cornwall CC (C13/94) [1996] I.C.R. 795



case concerned the implementation of directive 76/207/EEC<sup>671</sup>, known as the equal treatment directive. The question was whether article 2(1), which prohibits discrimination on the grounds of sex should be interpreted as including discrimination against a transgender person who had not yet undergone sexual reassignment surgery. In this case the court referred to *Rees*, *Cossey* and *B v France*, placing particular emphasis on the statement in *Rees* that the law on transsexuals should be constantly re-examined in the light of the circumstances and keeping in mind the severity of problems faced by the transgender community<sup>672</sup>. A definition of transsexual from the *Rees* case was also used<sup>673</sup>. The court found that transsexualism is a condition relating to a person's sex, and that the directive did not include language to suggest that it should be restricted to mean "one sex or another" that the directive should be interpreted as protecting transsexuals from discrimination as:

"Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment."<sup>674</sup>

As such the court found that such discrimination is a violation of article 2(1) of the directive. While this case is not directly on the issue of gender recognition, protection from discrimination, and the criteria for belonging to that protected class can be seen as a variation on gender recognition, as it relates to recognising when one can be considered to be a transgender person and when that category is a protected category. This can be relevant when discrimination law recognises a person as belonging to a category that they would not be considered to belong to by other areas of the law.

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<sup>671</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Official Journal L 039, 14/02/1976 P. 0040 - 0042

<sup>672</sup> *P v S* and *Cornwall CC* (C13/94) [1996] I.C.R. 795 at paragraphs 12 and 13 of the opinion of the advocate general

<sup>673</sup> *P v S* and *Cornwall CC* (C13/94) [1996] I.C.R. 795 paragraph

<sup>674</sup> *P v S* and *Cornwall CC* (C13/94) [1996] I.C.R. 795 paragraph 21

The issue of gender recognition in the UK was again revisited by the European Court of Human Rights in *Sheffield and Horsham v United Kingdom* in 1992<sup>675</sup>. In this case two cases were combined to be heard together, as they shared similar elements of objecting to the lack of legal gender recognition for transgender people in the UK and allegations of violations of articles 8, 12, 13 and 14.

With regards to article 8 the court found that the issues faced by applicants did not reach such severity that would tip the balance in favour of requiring the UK to implement gender recognition measures<sup>676</sup>. It also found that there had not been sufficient changes in the lack of consensus among states in the Council of Europe on the matter, and the science on transsexuals had not advanced to the point where determining gender based on biological sex could be considered unreasonable<sup>677</sup>. It found that the available measures for gender recognition should be kept constantly under review, and even with the lack of medical certainty, increased social acceptance and acknowledgement of problems faced by transgender meant that states should continue to review their gender recognition measures<sup>678</sup>. The court also found that there was no violation of article 12, due to the presence of the words “found a family” which, in the courts view, was sufficient to justify the view that restricting this right to couples of differing biological sexes could be justified, referring to its previous judgement in *Cossey*<sup>679</sup>. The court also found no violations of article 14 due to the lack of breaches of articles 8 and 12, and no violation of article 13.

Following *Sheffield and Horsham v UK* the issue of gender recognition in the UK would next be dealt with by the ECHR in the case of *Goodwin v UK*. However, between these two cases the issue of gender recognition for various purposes was still being raised in domestic courts. Notably in the case of *Chief Constable of The West Yorkshire Police v A and Another (No 2)*. Which, while it would be heard in the Employment Appeal Tribunal before *Goodwin*, would conclude in the Supreme Court 2 years after that case. *Chief Constable of The West Yorkshire Police v A and Another (No 2)* concerned whether the chief constable had discriminated against a transgender woman contrary to the Sex Discrimination (Gender

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<sup>675</sup> *Sheffield and Horsham v United Kingdom* (1999) 27 E.H.R.R. 16

<sup>676</sup> *Sheffield and Horsham v United Kingdom* (1999) 27 E.H.R.R. 163 at paragraph 59

<sup>677</sup> *Sheffield and Horsham v United Kingdom* (1999) 27 E.H.R.R. 163 At paragraph 56

<sup>678</sup> *Sheffield and Horsham v United Kingdom* (1999) 27 E.H.R.R. 163 At paragraph 60

<sup>679</sup> *Sheffield and Horsham v United Kingdom* (1999) 27 E.H.R.R. 163 At paragraphs 66-67

Reassignment) Regulations 1999/1102 in not hiring her as a police constable on the grounds that a female constable would need to conduct intimate searches of women. It is worth noting that unlike the ECHR cases up to this point, which focus on whether the UK should be required to implement a centralized form of gender recognition, this case focused on specificity on whether the need to conduct intimate searches should be considered a genuine occupational requirement which would justify excluding a transgender person from that employment. This case is somewhat similar to *Corbett*, as while on the surface it addressed a discrimination issue, the core of the question that the EAT asked itself was “what should a person’s gender be considered to be for a specific purpose”, the purpose in this case being that of conducting intimate searches. In this case the employment appeal tribunal stated:

“The domestic authorities speak with one voice, an echo of *Corbett v Corbett* (or *se Ashley*) [1971] P 83. No decision of the European Court of Justice binds us to ignore those domestic authorities. Whilst we recognise the very real strength of Miss Harrison's argument that it is time that a change was made, we see irresistible force in leaving any change to Parliament. The need for certainty and consistency in *R v Tan* [1983] QB 1053 suggests that on a subject that has implications as diverse as, for example, the meaning of marriage, the definition of incest, the ingredients of rape and the availability of one or other of differential annuity or pension rights, it would be undesirable for a case-by-case judge-made departure from or extension of or failure to depart from or extend *Corbett* with, inevitably, finer and finer distinctions been drawn between past and present cases as the incremental development of case law progressed. Better by far that Parliament should deal with the subject, as both Johnson J and the majority in the Court of Appeal in *Bellinger* have underlined. Accordingly, whilst we add our voices to those inviting the legislature to grasp this nettle, we shall, adopting *Corbett*, recognise the applicant as male in law, notwithstanding surgical or other intervention and notwithstanding her wish to be treated as, and such ability as she has to be taken to be, female.”<sup>680</sup>

This reiterates the statement made in *R v Tan*, that a uniform legal gender is necessary for legal certainty. It states that Tan suggests that on such an important topic as legal gender, that a case by case approach should not be taken, and that it should be up to Parliament to create a solution. This seems to, while citing *Corbett*, represent a movement away from the possibility

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<sup>680</sup> *Chief Constable of The West Yorkshire Police v A and Another* (No 2) [2002] I.C.R. 552 paragraph 19

of a person having multiple legal genders for various purposes that was mentioned in that case.

The case was appealed, but Lord Bingham's judgement in the House of Lords seems to agree with that at the EAT on this issue, speaking about the Corbett and Tan decisions he stated that:

“Both decisions have been heavily criticised, and other jurisdictions have adopted other rules. But there was nothing in English domestic law to suggest that a person could be male for one purpose and female for another, and there was no rule other than that laid down in Corbett and R v Tan.”<sup>681</sup>

While this seems to be a fairly definitive declaration that if the notion of a person having multiple different legal genders for certain legal purposes was created in Corbett, it no longer exists in English and Welsh, or that it never existed at all. However, there may be a number of reasons to treat this statement with scepticism.

Firstly, on a purely literal level it is not true that there is nothing in English domestic law to suggest this, as this suggestion can be derived from Corbett itself. The most charitable reading of this statement would be to say that the idea of a person having different genders recognised in situations where sex/ gender is relevant but not essential is *obiter dicta* and as such not a part of any precedent created by Corbett. However, it seems as though this is not the case, as the discussion of those categories relating to how the law interacts with a person's gender seems to be a vital part of the core reasoning in the case. In deciding that sex should be regarded as “essential” in marriage it was necessary to draw a line between those cases where sex may be “essential” and those where it is not. Without this distinction Ormrod J would have been unable to explain why marriage should be treated differently from national insurance, which, as stated in the Corbett case, was already recognising the gender identities of some transgender people at the time of the case<sup>682</sup>. As such it seems most likely that the idea of different genders being recognised for different purposes in situations where gender is relevant but not essential forms a vital part of the core reasoning in the case and as such should be regarded as *ratio decidendi* and therefore as a part of English common law.

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<sup>681</sup> A v Chief Constable of West Yorkshire [2004] UKHL 21 paragraph 3

<sup>682</sup> Corbett v Corbett (otherwise Ashley) (No.1) [1971] P. 83 at 86

Secondly, the Corbett and Tan cases can be read as being related to a specific purpose. As Ormrod J. in Corbett explicitly states that the case is concerned only with marriage, and *R v Tan* only mentions sexual offences when talking about the “unacceptable situation” that recognising diverging legal genders in that case would create<sup>683</sup>, which may suggest that the case should be read as only referring to sexual offences. Whether it intended to place the offence at hand in that case into the realm of situations where sex is “essential” is unclear, but that reading does seem justified. Even if the intent in Tan was not to categorise sexual offences as one’s where sex is “essential”, it could still simply be an exercise of creating a set of criteria, linked to the set used in Corbett for gender recognition relating to a set of offences that exist in the “relevant but not essential” category. While it does talk about certainty, it seems as though nothing in *R v Tan* explicitly rules out the idea that multiple genders can be recognised for multiple purposes, rather it simply states that for the offences at hand an approach consistent with marriage should be taken. As such it may be the case that neither of the cases mentioned do actually assign to anyone a fixed legal gender for all purposes.

The third reason one may treat this statement with scepticism comes from elsewhere in the same case. Lady Hale, in the same case, stated that:

”As to domestic law, there might be good policy reasons for distinguishing between the different purposes for which the decision in Corbett [1971] P 83 may be invoked. Marriage can readily be regarded as a special case.”<sup>684</sup>

and later:

“It is less clear why the immutability of birth gender for marriage purposes should apply for all other purposes, in particular to those criminal offences which used to depend upon the gender of the accused or the victim. Many of those distinctions were of historical origin having nothing to do with the different physical characteristics of the people concerned. It was a nonsense at the time of Tan [1983] QB 1053 that the offence of living on the immoral

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<sup>683</sup> Regina v Tan and Others [1983] 3 W.L.R. 361 at 1064

<sup>684</sup> A v Chief Constable of West Yorkshire [2004] UKHL 21 paragraph 51

earnings of a prostitute could only be committed by a man and scarcely surprising that the Court of Appeal found it convenient to apply the Corbett reasoning in that case. On the other hand, in so far as criminal offences did depend upon sexual differences, it might be thought that the physical differences which enabled the various acts to be performed were more important than chromosomal similarities, so that a female-to-male trans person might be guilty of rape (as originally defined) and a male-to-female transsexual might be its victim. For present purposes, it is unnecessary to decide the point. The Sexual Offences Act 2003 adopts a gender neutral approach which makes it much less important irrespective of the Gender Recognition Bill.”<sup>685</sup>

This seems to make it clear that Lady Hale saw that it may be desirable for a person to be legally recognised as one gender for some purposes, but not for others. This section also argues that the Tan case may have partly been decided in the way that it was to produce a just result, as the gender distinction in that case was “nonsense” which would only have served to allow someone to evade conviction.

It is worth noting that the final judgement in the West Yorkshire police case was that a transsexual woman should be treated as a woman and should not be discriminated against by being treated differently from other women. This is despite her not having a gender recognition certificate, as the Gender Recognition Act had not yet become law. Lord Bingham agreed with the result, but on different grounds<sup>686</sup>. As such it may be that this case should not be relied on as a definitive source as to whether a person can have different legal genders for different purposes, due to the disagreement between Lord Bingham and Lady Hale on the subject, and, because it was not the central issue of the case, neither of their judgements is a minority dissenting judgement, so neither can be regarded as more authoritative on the subject than the other.

The next major case on this issue was *Goodwin v UK*<sup>687</sup>. In this case the applicant was a transgender woman who encountered difficulties due to the state of the UK's gender recognition law. She had been sexually harassed at work from 1990-1992 but had lost her

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<sup>685</sup> A v Chief Constable of West Yorkshire [2004] UKHL 21 paragraph 52

<sup>686</sup> A v Chief Constable of West Yorkshire [2004] UKHL 21 paragraph 24

<sup>687</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18

case at employment tribunal because she was deemed to be a man for the purposes of the law in that area<sup>688</sup>. She was unable to obtain a new national insurance number and was experiencing problems at her new job which she suspected might be due to her existing national insurance number being associated with records stating that she was male<sup>689</sup>. She was also treated as male for the purposes of retirement and pension but was eventually able to come to an agreement with the Department of Social Security<sup>690</sup>.

Due to this her records were classified as sensitive, meaning they were only able to be read by employees at a certain rank or above. While this measure was intended to protect her privacy, it resulted in her being unable to deal with routine matters at the local office, instead having to make special appointments for everything. Despite these measures she still received letters from the Department of Social Security in her old name<sup>691</sup>. She had also been unable to receive certain entitlements which required a birth certificate as proof of identity due to her birth certificate recording her sex as male and her desire to not disclose this. Because of this she had been unable to receive a loan conditional upon life insurance, a re-mortgage offer and an entitlement to winter fuel allowance. She also felt unable to report a theft of 200 pounds due to fear that the police would become aware of her transgender status<sup>692</sup>. Because of this she alleged violations of article 8, 12, 13 and 14.

With regards to article 8, the court stated that while the court had in the past deemed the UK's treatment of transsexuals to not be a violation of article 8, this was because measures had been taken to mitigate any harm done, for example recognising people as their “new” gender for the purposes of national insurance<sup>693</sup>. However, in this case, while the government had made special arrangements with the applicant, these special arrangements themselves caused inconvenience and may have increased the chance that her transsexual status was disclosed<sup>694</sup>. The court pointed out the harms of the facts of a person’s life not aligning with the legal category they were placed in<sup>695</sup>, as well as the seeming inconsistency that the NHS

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<sup>688</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 15

<sup>689</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 16

<sup>690</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 17

<sup>691</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 18

<sup>692</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 19

<sup>693</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 73

<sup>694</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 76

<sup>695</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 77

carried out “sex change” procedures, but the UK was not willing to legally recognise the change in status these surgeries were intended to result in<sup>696</sup>. It was also pointed out how the poor treatment of transsexuals had been recognised domestically in *Bellinger v Bellinger*<sup>697</sup>, as well as the increasing international movement towards legal recognition of transgender people<sup>698</sup>. The court also found that the lack of medical consensus referred to in the Sheffield and Horsham cases was not relevant, as while transgender people cannot change all of their characteristics, the court was unconvinced that the unchangeable characteristics, such as chromosomes, should take precedence<sup>699</sup>.

Overall with regards to article 8 the court found that any burden imposed on the UK would be manageable<sup>700</sup>, as reinforced by the findings of the UK's own working group report on the issue<sup>701</sup>, and that such burdens would be justified to rectify the problems the current law was causing for transsexuals<sup>702</sup>.

The court found that the UK had breached article 12. While the court acknowledged its previous rulings on the issue, it stated that the inability to reproduce should not be interpreted as preventing someone from participating in a marriage as protected by article 12<sup>703</sup>. The court found that because of this there was no basis for the claim that article 12 should be interpreted as requiring the terms “man” and “woman” in purely biological terms<sup>704</sup>. The court found there was no violation of article 14, as because it had found a breach of article 8 and 12 there was no separate complaint<sup>705</sup>. It similarly found there was no violation of article 13 as the lack of a domestic remedy against domestic law did not necessarily mean there was no effective remedy<sup>706</sup>.

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<sup>696</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 78

<sup>697</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 79, Although this case found that the court could take no action in the absence of legislation.

<sup>698</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraphs 84-85

<sup>699</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 82

<sup>700</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 91

<sup>701</sup> Report of the Interdepartmental Working Group on Transsexual People, April 2000, Located at [http://webcache.googleusercontent.com/search?q=cache:\\_wwlG1k\\_tFAJ:www.oocities.org/transforum2000/Resources/wgtrans.pdf+&cd=1&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:_wwlG1k_tFAJ:www.oocities.org/transforum2000/Resources/wgtrans.pdf+&cd=1&hl=en&ct=clnk&gl=uk) accessed 10/01/2020

<sup>702</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 93

<sup>703</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 98

<sup>704</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 100

<sup>705</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 108

<sup>706</sup> Goodwin v United Kingdom (2002) 35 E.H.R.R. 18 at paragraph 113



At this stage it is worth noting the contrast between *Goodwin*, which represented arguably the most important case on this issue and *Corbett*, the cornerstone of British law on this issue. Both cases address the issue of gender recognition but they address it in somewhat different ways and with a different set of priorities. While *Corbett* focused on whether a transgender woman should have the right to be treated according to her gender identity for a specific purpose, *Goodwin* addressed the injustices caused by not having one's gender recognised in a singular unified way. While this may seem to be merely a difference in scale, this difference can be seen in another way: the difference between a right to be seen, and a right to disappear. This can be seen by examining the focus in the *Goodwin* case on the injustices a trans person can be exposed to when their legal genders for various purposes do not match with each other or with their gender identity. In many ways the focus can be said to be less on the injustice of not being recognised as one's gender, but on the injustice of being compelled by the systems in place to be seen as transgender in a social situation where this can expose one to prejudice. This is at its most apparent when one recalls that one of the key issues in the case was the article 8 right to privacy, specifically because the systems in place caused data, namely a person's trans status, to be made public against their will and thus causing them harm. This is of interest because it represents a core tension at the heart of gender recognition, the conflict between the desire to be seen<sup>707</sup>, and the desire to avoid being seen to avoid discrimination and mistreatment in a society where transphobic bigotry persists.

After the *Goodwin* case the issue of gender recognition was again addressed in the House of Lords in the case of *Bellinger v Bellinger*<sup>708</sup>. This case concerned a transgender woman who had married a man, and wanted a declaration that the marriage was valid<sup>709</sup>. The court found that while the present situation was "unsatisfactory" that it could not make a judgement as to when gender transition would be considered to be sufficient for the purposes of marriage

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<sup>707</sup> Taking Public Responsibility for Gender: When Personal Identity and Institutional Feminist Politics Meet, Cooper, D. (2020), *feminists@law*, 10(2), page 15

<sup>708</sup> *Bellinger v Bellinger* (Attorney General intervening) [2002] Fam. 150

<sup>709</sup> *Bellinger v Bellinger* (Attorney General intervening) [2002] Fam. 150 para 1

without a clear statutory framework<sup>710</sup>. As such, because no legislation had been passed at the time, the appeal was dismissed.

The dissenting judgement in this case, written by *Thorpe LJ*, is worth examining. In this dissent a number of the cornerstones of British law on this subject were questioned. This not only includes criticism of the Corbett judgement, particularly that that judgement seems to have ignored psychological factors in determining gender<sup>711</sup>, but also includes questioning the foundational case in this area, *Hyde v Hyde*<sup>712</sup>. While this dissent was critical of *Hyde v Hyde*, stating that it may not have a place in modern society due to social and economic changes<sup>713</sup>, the dissent rests on the notion that the court can and should be able to rule on who should be considered a man or a woman for the purposes of marriage, particularly as getting legislation passed on the issue would be likely to take some time<sup>714</sup>. With that established LJ Thorpe points out that our understanding of the issue, as well as the prevailing social environment, have changed significantly since *Corbett v Corbett*<sup>715</sup>, and that these changes should be taken into account for the law to meet the needs of society<sup>716</sup>.

Following this the UK introduced the Gender Recognition Act in 2004<sup>717</sup>. The act was intended to remedy the issues which had resulted in the UK being found to be in breach of articles 8 and 12. It does so by creating a mechanism by which birth certificates can be altered to reflect a person's gender. This is intended to solve the article 8 issues by allowing a transgender person to keep their gender assigned at birth a secret if they so desire<sup>718</sup>, and the article 12 issue is solved by the fact that once a person's birth certificate is altered they are considered to be of that sex for all purposes, including marriage, which solves the issue of only recognising biological sex for the purposes of marriage post Corbett.

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<sup>710</sup> *Bellinger v Bellinger* (Attorney General intervening) [2002] Fam. 150 para 109

<sup>711</sup> *Bellinger v Bellinger* (Attorney General intervening) [2002] Fam. 150 para 122

<sup>712</sup> *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130, 133

<sup>713</sup> *Bellinger v Bellinger* (Attorney General intervening) [2002] Fam. 150 para 127

<sup>714</sup> *Bellinger v Bellinger* (Attorney General intervening) [2002] Fam. 150 para 155

<sup>715</sup> *Bellinger v Bellinger* (Attorney General intervening) [2002] Fam. 150 para 155

<sup>716</sup> *Bellinger v Bellinger* (Attorney General intervening) [2002] Fam. 150 para 157

<sup>717</sup> Gender Recognition Act 2004

<sup>718</sup> Although the original version of the act allowed sports clubs to ask to see a certificate, so this secrecy would be contingent on the condition that the transgender person was prepared to commit to never play a sport where competitors are separated based on gender.

The act is substantively fairly simple, although a number of criticisms can be made of it, which will be discussed later. The act creates a panel, made up of legal and medical professionals, called the Gender Recognition Panel, to which applications may be made. To apply a person must either produce evidence of gender recognition from another jurisdiction, or demonstrate that they have gender dysphoria, have “lived in the acquired gender” for at least two years, intend to live in that gender for the rest of their life and must provide the relevant evidence<sup>719</sup>. Only people over the age of 18 may apply<sup>720</sup>. The evidence required takes the form of reports by a registered medical practitioner or psychologist and a statutory declaration that they meet the “living in the acquired gender” requirement, and any other evidence required<sup>721</sup>. Applications are done through a standard form<sup>722</sup>. Currently two medical reports are required, as well as a fee of 140 pounds. When the act was first introduced a person could not apply if they were married, and would have to end their marriage before a certificate could be issued. When a certificate was issued a person’s sex on their birth certificate would be altered and a note of the alteration would be made on a gender recognition registry, which would not be available to the public. A person’s legal sex and gender would then be considered to be the one noted on their birth certificate, for all purposes<sup>723</sup>. This replaced the previous system mentioned in the ECHR cases where a person’s gender could be recognised differently in different areas of life.

It is worth briefly mentioning *Grant v UK*<sup>724</sup>, which concerned a transgender woman who sought gender recognition for the purpose of claiming a state pension. She was recognised as female for this purpose, and paid the female rate for contributions until the rates were equalised in 1975<sup>725</sup>. However, when she reached the age of 60, which was the retirement age for women at the time, she was told she would have to wait until she was 65, the age of eligibility for men<sup>726</sup>. She appealed against this decision twice, but was unsuccessful on both occasions<sup>727</sup>. Following the decision in the Goodwin case she sought a declaration from the Court of Appeal that she should be granted pension at the same age as cisgender women,

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<sup>719</sup> Gender Recognition Act 2004 Section 2

<sup>720</sup> Gender Recognition Act 2004 Section 1 (1)

<sup>721</sup> Gender Recognition Act 2004 Section 3

<sup>722</sup> Form T450 available at <https://formfinder.hmctsformfinder.justice.gov.uk/t450-eng.pdf>

<sup>723</sup> Gender Recognition Act 2004 Section 4

<sup>724</sup> *Grant v The United Kingdom* [2006] ECHR 548

<sup>725</sup> *Grant v The United Kingdom* [2006] ECHR 548 para 7

<sup>726</sup> *Grant v The United Kingdom* [2006] ECHR 548 para 8

<sup>727</sup> *Grant v The United Kingdom* [2006] ECHR 548 para 10

However, her case was by mutual agreement held until the judgement in the, then pending, Bellinger case. She was advised that she was unlikely to receive this judgement given the view in Bellinger that the matter is best left for Parliament, and as such abandoned that case, as she could not continue to afford the legal costs<sup>728</sup>. She then applied to the ECHR in 2003, and was granted a gender recognition certificate in 2005 when it became possible to do so. The court found in this case that the UK was within the margin of appreciation in denying her a pension at 60 initially, however did violate article 8 by continuing to deny her the pension and gender recognition after the Goodwin case was decided until she was able to receive a gender recognition certificate under the Gender Recognition Act<sup>729</sup>.

The Gender Recognition Act also contains evidence of the conflation of gender and sex in UK law. Gaining recognition of one's gender results in one's legal sex also changing<sup>730</sup>. This was explicitly discussed when the GRA was being initially debated in Parliament<sup>731</sup>. The justification given for this was that without this conflation rights could be denied to transgender people on the grounds that their sex had not been changed. So a gender recognition certificate alters a person's sex to avoid the need to create a separate legal status for every combination of identity and phenotype<sup>732</sup> and to prevent a situation in which the goalposts are constantly moved to deny transgender people equal treatment to their cisgender counterparts<sup>733</sup>.

Following the Gender Recognition Act the next major piece of legislation concerning transgender people was the Equality Act 2010<sup>734</sup>. This act was designed to update and consolidate the UK's existing discrimination law, which up to this point was dealt with by a number of different acts and statutory instruments. While this is a large act, dealing with a

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<sup>728</sup> Grant v The United Kingdom [2006] ECHR 548 para 14

<sup>729</sup> Grant v The United Kingdom [2006] ECHR 548 para 51

<sup>730</sup> Gender Recognition Act 2004

<sup>731</sup> Gender Recognition Bill in Standing Committee A, House of Commons, 2nd sitting 9th March 2004 (afternoon), Located at <https://publications.parliament.uk/pa/cm200304/cmstand/a/cmgend.htm>, accessed 26/11/2020, Column 63

<sup>732</sup> Gender Recognition Bill in Standing Committee A, House of Commons, 4th sitting 11th March 2004 (afternoon), Located at <https://publications.parliament.uk/pa/cm200304/cmstand/a/st040311/pm/40311s01.htm>, Column 137

<sup>733</sup> House of Commons, Gender Recognition Bill in Standing Committee A, 4th sitting 11th March 2004 (afternoon), Located at <https://publications.parliament.uk/pa/cm200304/cmstand/a/st040311/pm/40311s01.htm>, Column 138

<sup>734</sup> Equality Act 2010

number of protected characteristics, the relevant one, when examining gender recognition, is the protected characteristic of “gender reassignment”. A person falls under the protection of this characteristic if:

“...the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex”<sup>735</sup>

This replaces the previous measures found in the Sex Discrimination Act 1975 added by the Sex Discrimination (Gender Reassignment) Regulations 1999<sup>736</sup>. While this provision contains some ambiguities, the explanatory notes and related content of Hansard are particularly useful in determining the intended effect of this section. The explanatory notes contain an example in which a person would fall under this characteristic, but has not sought medical treatment, instead they have decided to “live as a man”. The relevant sections of Hansard similarly make clear that this section is not intended to require a person to seek medical treatment<sup>737</sup>. Hansard also fleshes out what its creators believed would be the criteria for someone to be covered by it. For example it seems clear the envisaged the words “proposing to undergo” to require “a more definite decision point, at which the person’s protected characteristic would immediately come into being.”<sup>738</sup> It also seems that the criteria for this protection to exist that this internal decision point in some way manifest externally, in a way evident to others

“There are a lot of ways in which that can be manifested — for instance, by making their intention known. Even if they do not take a single further step, they will be protected straight away.

Alternatively, a person might start to dress, or behave, like someone who is changing their gender or is living in an identity of the opposite sex. That, too, would mean that they were protected. If an employer is notified of that proposal, they will have a clear obligation not to discriminate against them. If anything, a good employer would help them. However, without a clear decision even to propose to do that, it is difficult to see how, practically, an employer will know that the assistance is necessary. If what is going on is an internal cogitation, with

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<sup>735</sup> Equality Act 2010 Section 7 (1)

<sup>736</sup> The Sex Discrimination (Gender Reassignment) Regulations 1999, No.1102

<sup>737</sup> Hansard, HC Public Bill Committee, 6th Sitting, col.166 (June 11, 2009)

<sup>738</sup> HC Public Bill Committee, Hansard, 7th Sitting, col.204 (June 16, 2009)

no external manifestation, it is difficult to see how this can work practically. We want to ensure that people start their personal journey ...

As soon as there is a manifestation — as I have said already, and we discussed this last week too — the duty not to discriminate comes in.”<sup>739</sup>

It is clear from this that the authors of this legislation viewed acts, such as a declaration or changing one’s mode of dress to be forms of “changing physiological or other attributes of sex”. Although sex is often understood as referring to a person’s physical state, it seems that here acts such as changing one’s mode of dress, which would normally be considered forms of gender expression, are considered to be a part of sex, thus continuing the conflation of gender and sex in the law of the UK. Those with non-binary genders are also protected by this section<sup>740</sup>, as clarified in a recent employment tribunal decision<sup>741</sup>.

It is interesting to note that due to the wording of this section, intersex persons may be covered by this characteristic, despite not being mentioned in the legislation itself, nor in the explanatory notes or in Hansard. This is because the wording of section 7 requires a person to have undergone, be undergoing, or planning to undergo some process for changing physiological or other aspects of sex. While it is clear from the explanatory notes, wording used elsewhere in the section, and in Hansard, that the intent was gender and sex be conflated, It’s clear, because physiological changes are mentioned, that sex in this context means sex as it is normally understood, as a physiological classification, as well as being conflated with gender. As such intersex people could be covered by this section, so long as they had, at some point, undergone some alteration to their sexual characteristics. This is not particularly uncommon, as surgical procedures for making intersex people have a more normal genital appearance, as well as hormonal interventions, have been fairly common for a number of intersex conditions for several decades. Because of this, section 7 may inadvertently give discrimination protections to intersex persons, although it would be restricted to those who had experienced some kind of alteration of their sexual characteristics.

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<sup>739</sup> HC Public Bill Committee, Hansard, 7th Sitting, col.204 (June 16, 2009)

<sup>740</sup> Gender reassignment: scope of statutory definition, Eversheds Sutherland, PLC Mag. 2020, 31(10), 70-71

<sup>741</sup> Taylor v Jaguar Land Rover Ltd [2020] 9 WLUK 200

Another section of note relating to transgender people in the Equality Act 2010 is section 28. This section prevents the use of the characteristic of gender reassignment in cases of discrimination with regards to provision of services, if those services are reserved for persons of a single sex or are provided differently for different sexes or if separate services are provided for each sex<sup>742</sup>. This may indicate that transgender people were not considered to be “full” members of their gender, as, due to this section, a transgender woman would be unable to pursue a claim for discrimination if she was denied a service for women.

Also worth noting is that, while the section relating to transgender people does not mention gender or sex being binary, this can be found elsewhere in the Act. Section 11, which deals with the protected characteristic of sex states that:

“In relation to the protected characteristic of sex—

- (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;
- (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex.”<sup>743</sup>

The terms “man” and “woman” are further defined in section 212 of the Act to be “a male of any age” and “a female of any age” respectively<sup>744</sup>. Because “man” and “woman” are often used to refer to a person’s gender, whereas “male” and “female” are more often used to refer to physical sex, this can be seen as another point where the entanglement of gender and sex in UK law is continued. The usage of these terms in section 11 seems to amount to a statement that the only permissible sexes/genders are man/male and woman/female, with no intersex or non-binary status being recognised. It is important to note that while an intersex category does not exist within this section an intersex person could count as a member of either the male or female sex due to UK case law<sup>745</sup>. While such a person would be protected from

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<sup>742</sup> Equality Act 2010 Schedule 3 part 7

<sup>743</sup> Equality Act 2010 Section 11

<sup>744</sup> Equality Act 2010 Section 212

<sup>745</sup> *W v W (Physical Inter-Sex)* [2001] Fam 111

discrimination due to their being or being considered a man or a woman, due to the lack of an intersex category section 11 would most likely not be usable by a person alleging discrimination due to being intersex rather than due to being considered a man or a woman.

Following the Equality Act the next major relevant piece of legislation was the Marriage (Same-Sex Couples) Act<sup>746</sup>. This act extends the right to marry to same sex couples<sup>747</sup>, while leaving the existing system of civil unions intact. This essentially gives same sex couples a choice of whether they prefer a civil union or a marriage. Civil unions remained only assessable to same sex couples until amendments made by the Civil Partnership (Opposite-sex Couples) Regulations 2019, which were produced in accordance with the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019<sup>748</sup>. The Marriage (Same-Sex Couples) Act is notable as while it could be seen as an implementation of the concept of “marriage equality”, it differs from similar pieces of legislation in other jurisdictions in a number of interesting ways, with the result that any equality obtained could be seen as imperfect, particularly in cases involving transgender or intersex people.

The first notable feature of this act is that while it does extend the right to marry to same sex couples, it creates a number of situations in which same-sex marriages are to be treated as different from opposite-sex marriages. The act explicitly states that any duty so solemnise marriages does not extend to same-sex marriages, and that no one can be compelled to, through enforcement of a contract or other means, provide any of the “opt-in” services, necessary for a marriage to take place<sup>749</sup>. This means that same sex marriages are, in some way, fundamentally different, as protections exist within this Act allowing a person to refrain from providing necessary aspects of those marriages where no such protections exist for opposite-sex marriages. These differences may seem trivial, but it means that sex is still a relevant factor in marriage, so when gender recognition measure are absent, fail, or do not represent the reality of a person’s life, this will influence their ability to marry. The wording of section 1(1 is also relevant, as the wording “Marriage of same sex couples is lawful.”

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<sup>746</sup> Marriage (Same Sex Couples) Act 2013

<sup>747</sup> Marriage (Same Sex Couples) Act 2013 Section 1

<sup>748</sup> Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 Section 2

<sup>749</sup> Marriage (Same Sex Couples) Act 2013 Section 2



means that the Act does not aim to make gender or sex (as they are entangled concepts in British law) a non-factor in marriage. Instead it merely expands marriage to one additional set of sex-combinations, those which could be interpreted as “same sex couples”. The main impact of this is that it only permits a person to marry regardless of sex if only two sex categories exist. While UK law does not currently acknowledge more than two sex categories, this does mean that amendments would be necessary if one or more additional sex categories were to be acknowledged if persons in those categories are to be permitted to marry regardless of sex. It may be interesting to see what the response of the law would be to a person acknowledged as being intersex or having a non-binary gender in another jurisdiction attempted to marry in the UK. At the time of writing no case matching this description has been brought to court.

The second notable aspect of this Act has come to be referred to as “the spousal veto”<sup>750</sup>. Section 12 of the Act<sup>751</sup>, combined with schedule 5, amend the Gender Recognition Act to include a number of new measures referring to marriage. Originally the Gender Recognition Act included a measure which meant that an applicant who was married would receive an interim gender recognition certificate rather than a full certificate. The interim certificate had no effect on a person’s legal sex or gender and did not cause an alteration of their birth certificate. Its sole function was to render a marriage voidable<sup>752</sup>. Once the marriage was dissolved a full certificate could be issued<sup>753</sup>. This measure ensured that a person could not marry and then obtain a gender recognition certificate, which would result in a same-sex marriage being legally recognised. The Marriage (Same Sex Couples) Act altered this provision<sup>754</sup>. An applicant who is in a protected marriage must attach to their application a signed statement from their spouse stating that the spouse consents to the continuation of their marriage<sup>755</sup>. If the spouse does not sign such a document an interim certificate will be issued. There is currently no provision permitting the creation of a full certificate for a person whose spouse does not sign such a document. As such there is a concern that the spouse of a

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<sup>750</sup> Transgender equality, first report of the session 2015-2016 HC 390, House of commons Women and Equalities Committee, Published on 14 January 2016 located at <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, accessed 18/01/2021 Para 49

<sup>751</sup> Marriage (Same Sex Couples) Act 2013 Section 12

<sup>752</sup> The Matrimonial Causes Act 1973 Section 12 (1) (g)

<sup>753</sup> Gender Recognition Act 2014 Section 5 (as originally enacted)

<sup>754</sup> Marriage (Same Sex Couples) Act 2013 Schedule 5

<sup>755</sup> Gender Recognition Act 2004 Section 4 (2) (b)

person applying for a recognition certificate could use this provision to hold a person's gender hostage. If a person did not want for their marriage to end, they would be forever unable to receive a full recognition certificate. This means that the person will be trapped in the legal gender they were assigned at birth.

If a person has been issued an interim certificate they can be issued a full certificate once the marriage has ended<sup>756</sup>. If a person applying is in a civil partnership, they will be issued an interim certificate. They may then, within a 6 month window, apply to have their civil partnership converted to a marriage. If this occurs they will then be issued a full recognition certificate. If a person is in a civil partnership and they and their partner are both applying for gender recognition certificates at the same time they will both be issued full recognition certificates.

The Marriage (Same Sex Couples) Act<sup>757</sup> also introduced the alternate route, which allows a person to apply for a gender recognition certificate if a person meets the following criteria:

“3) The first condition is that the applicant was a party to a protected marriage or a protected civil partnership on or before the date the application was made.

(4) The second condition is that the applicant—

(a) was living in the acquired gender six years before the commencement of section 12 of the Marriage (Same Sex Couples) Act 2013,

(b) continued to live in the acquired gender until the date the application was made, and

(c) intends to continue to live in the acquired gender until death.

(5) The third condition is that the applicant—

(a) has or has had gender dysphoria, or

(b) has undergone surgical treatment for the purpose of modifying sexual characteristics.

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<sup>756</sup> Gender Recognition Act 2004 Section 5

<sup>757</sup> Marriage (Same Sex Couples) Act 2013 Schedule 5

(6) The fourth condition is that the applicant is ordinarily resident in England, Wales or Scotland.”<sup>758</sup>

It is also worth noting that a marriage is also voidable if one of the persons involved has had a gender recognition certificate issued at any point in the past<sup>759</sup>.

The “spousal veto” has been criticised by a number of community and activist groups<sup>760</sup>. Perhaps due to this criticism in Scotland a person may have an interim certificate issued because they are in a marriage to be converted immediately into a full certificate<sup>761</sup>. As such the spousal veto cannot be said to exist in Scotland.

The recent transgender equality report by the Women and Equalities Committee received a number of submissions relating to the spousal veto. Particularly notable is the submission from GIREs, which states:

“Trans people are the only group that can have their civil rights delayed by another [...] What is clear is that the effect of the veto is that the “feelings” of the non trans spouse are given more importance than the rights of the trans person to gain full civil participation. This is a clear indication that government considers trans people as less than equal “<sup>762</sup>

This is an understandable position, as the right to gender recognition has been recognised as a fundamental right<sup>763</sup>. As such the spousal veto can be seen as a license for a person to violate one of their spouse’s fundamental rights.

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<sup>758</sup> Gender Recognition Act 2004 Section 3A

<sup>759</sup> The Matrimonial Causes Act 1973 section 12 (1) (h)

<sup>760</sup> Transgender equality, first report of the session 2015-2016 HC 390, House of commons Women and Equalities Committee, Published on 14 January 2016 Located at <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf> Para 61

<sup>761</sup> Gender Recognition Act 2004 c. 7 section 4E

<sup>762</sup> Transgender equality, first report of the session 2015-2016 HC 390, House of commons Women and Equalities Committee, Published on 14 January 2016 Located at <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf> paragraph 49

<sup>763</sup> As recognised in the Goodwin case and in The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, International Commission of Jurists (ICJ), 10 November 2017, principle 31

The government responded, and explained the reasoning behind the measure:

“[The requirement for consent] does not mean anyone will have a right to prevent their wife or husband obtaining a legal gender change; simply that they will be allowed to decide whether they want their marriage to continue before gender recognition is granted. Marriage is a contract between two individuals and it is right that both spouses should have an equal say in their future when there is a fundamental change [...] The Ministry of Justice has committed to monitor issues arising from the spousal declaration of consent. Since the gender recognition provisions of the 2013 Act were only introduced in December 2014, there is not yet enough evidence to review the impact of these changes.”<sup>764</sup>

The Minister of Justice also stated:

“If we look at how this system works, nobody has the right to prevent their wife or husband from obtaining a legal gender change [...] This is a really careful balancing act between making sure we understand that any marriage contract is a contract between two people and a spouse’s transition can fundamentally change their relationship. For some people, that will not make any difference. For some people, they married a person; they did not marry a man or a woman [...] For others, that might make a difference, particularly because the law allows the new marriage certificate to show the name of the trans spouse, so it is important that they have given their indication that they are happy for that to go ahead.”<sup>765</sup>

This reasoning can be distilled to the following: that marriage is an intimate contract, and in such a contract when circumstances change significantly there should be a prompting to re-examine that relationship and terminate it. There is also the second notion, raised by the Minister for Justice, that because a gender recognition certificate results in a change of name on the marriage certificate that the spouse of the person seeking gender recognition should be entitled to block that.

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<sup>764</sup> Transgender equality, first report of the session 2015-2016 HC 390 Published on 14 January 2016, House of commons Women and Equalities Committee, Located at <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf> paragraph 55

<sup>765</sup> Transgender equality, first report of the session 2015-2016 HC 390 Published on 14 January 2016, House of commons Women and Equalities Committee, Located at <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf> paragraph 56

This reasoning seems somewhat flawed. If a marriage should be re-examined when circumstances change significantly, then why do similar measures not exist to prevent a spouse from changing to a less lucrative job, or undergoing any body modification procedure? It seems as though there are many significant life changes which similar measures do not exist for. As such it is curious as to why legal gender recognition was singled out among all of these changes.

The secondary piece of reasoning is also similarly flawed, as a person's name may be altered on multiple documents, including documents such as joint bank account statements, without the consent of the spouse. It is possible that the minister would respond that a marriage certificate is such a special document, that any alteration to it must be held to a higher standard than any other document. Ultimately no response can be offered to this, other than to question why this document should be considered more important than any other, and to ask if any purpose is served by this special status, as well as if this special status is being regarded in a proportional fashion when it comes into opposition with a person's fundamental rights.

There may be relevant ECHR case law on this matter. *Hamalainen v Finland*<sup>766</sup> concerned a transgender woman who had had surgery and other medical treatment while married, and had changed her name despite the fact that her national identity number could not be changed. This number and her passport still referred to her as male<sup>767</sup>. She then applied to have these altered, but was told that this was not possible, as the relevant law required either that an applicant be unmarried or that the spouse give consent to have the marriage converted to a civil partnership. She alleged that this was in violation of article 8, as her spouse's refusal to give consent, combined with her religious convictions against divorce, meant that she was being denied the right to have her gender legally recognised<sup>768</sup>. The court agreed that article 8 was engaged<sup>769</sup>, however did not find that there was a violation<sup>770</sup>. The court did as had been

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<sup>766</sup> *Hamalainen v Finland* (37359/09)

<sup>767</sup> *Hamalainen v Finland* (37359/09) paragraphs 9-12

<sup>768</sup> *Hamalainen v Finland* (37359/09) paragraph 34

<sup>769</sup> *Hamalainen v Finland* (37359/09) paragraph 64

<sup>770</sup> *Ibid*

done in previous cases relating to transgender people. It analysed the issue in terms of if a positive obligation on the member states could be justified<sup>771</sup>, the court also referred to the lack of consensus among the Council of Europe<sup>772</sup>. The court stated that the requirement for consent was a reasonable measure to protect one party from unilateral decisions made by the other<sup>773</sup>, and that the government was within the margin of appreciation to restrict marriage to heterosexual couples<sup>774</sup>. It also pointed out that the government, unlike most Council of Europe states, allowed a person to stay in their relationship and have their gender recognised<sup>775</sup>. The court also stated that the conversion to a civil partnership would not result in a significant change to the applicant's life<sup>776</sup>. Particularly noteworthy is the court's summing up of its judgement:

“While it is regrettable that the applicant faces daily situations in which the incorrect identity number creates inconvenience for her, the Court considers that the applicant has a genuine possibility of changing that state of affairs: her marriage can be converted at any time, *ex lege*, into a registered partnership with the consent of her spouse. If no such consent is obtained, the possibility of divorce, as in any marriage, is always open to her. In the Court's view, it is not disproportionate to require, as a precondition to legal recognition of an acquired gender, that the applicant's marriage be converted into a registered partnership as that is a genuine option which provides legal protection for same-sex couples that is almost identical to that of marriage (see *Parry v. the United Kingdom* (dec.), cited above). The minor differences between these two legal concepts are not capable of rendering the current Finnish system deficient from the point of view of the State's positive obligation.”<sup>777</sup>

Not only does this paragraph sum up the view of the court on this issue, but in setting out the issues the court states that it is weighing to determine proportionality, it may indicate more than objective weighing. In this paragraph the court describes issues faced by the applicant as “inconveniences”. This may be a minimising of the issue and a possible indication that the

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<sup>771</sup> *Hamalainen v Finland* (37359/09) paragraph 66

<sup>772</sup> *Hamalainen v Finland* (37359/09) paragraph 73

<sup>773</sup> *Hamalainen v Finland* (37359/09) paragraph 82

<sup>774</sup> *Hamalainen v Finland* (37359/09) paragraph 81

<sup>775</sup> *Hamalainen v Finland* (37359/09) paragraph 80

<sup>776</sup> *Hamalainen v Finland* (37359/09) paragraph 83

<sup>777</sup> *Hamalainen v Finland* (37359/09) paragraph 87

court may not have recognised the severity of such issues, which it had done in previously in the Goodwin case<sup>778</sup>.

The dissent in this case is important, in particular the dissenting judges object to the framing of the question in terms of positive obligations<sup>779</sup>, which is reminiscent of judge Martens dissent in *Cossey v United Kingdom*. The dissenting judges also pointed out that the lack of consensus among states should not be treated as decisive<sup>780</sup> and, importantly that the majority opinion did not take due regard of the issues faced by the applicant with regards to converting the marriage into a civil partnership<sup>781</sup>. The dissenting justices point out that that it is problematic to pit the rights to one's civil status and gender identity against each other, and that the court had largely ignored the applicant's religious objections to converting the marriage or divorce. The dissent also pointed out the minimizing language which was used to refer to the issues faced by the applicant as an "inconvenience"<sup>782</sup>. The dissenting justices also objected to the claim in the majority judgement that the interference with the article 8 rights in question were justified:

"When examining Article 8 separately, however, the Court must examine not whether a justification for a difference in treatment exists, but whether a restriction of rights is permissible in pursuit of one of the aims listed in Article 8 § 2. As the restriction in question is clearly not necessary in order to protect Finnish national security, public safety, or economic well-being, to prevent disorder or crime, or to protect health, the only two possible grounds for restriction are the protection of the rights and freedoms of others or of morals.

We submit that the rights and freedoms of others would in no way be affected if the applicant and her wife were permitted to remain married despite the applicant's legal change of gender. Their continued marital relationship would not have detrimental effects for the right of others to marry, or for existing marriages.

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<sup>778</sup> *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18 at paragraph 77

<sup>779</sup> *Hamalainen v Finland* (37359/09) paragraph 4 of the dissent

<sup>780</sup> *Hamalainen v Finland* (37359/09) paragraph 5 of the dissent

<sup>781</sup> *Hamalainen v Finland* (37359/09) paragraph 6 of the dissent

<sup>782</sup> *Hamalainen v Finland* (37359/09) paragraph 8 of the dissent

Secondly, while we acknowledge that the protection of the traditional family may be justified by certain moral concerns, we consider that the protection of morals does not provide sufficient justification for the restriction of the applicant's rights in this case.”<sup>783</sup>

While *Hamalainen v Finland* may support the “spousal veto” measures, in so far as it may mean they are not a violation of article 8 of the convention, the dissenting judgement may be compelling. Particularly if cases arise where obtaining consent from the spouse or dissolving the marriage are “not an option” as the dissent claimed was the case in *Hamalainen*. It would be interesting to see what the majority in that case would have ruled if they had agreed with the dissent on the issue of whether or not the applicant had any viable options.

Despite criticism of the reasoning supporting the existence of the spousal veto, and the criticisms of the measure itself, the Women and Equalities Committee ultimately did not recommend that it be amended or removed. Instead recommending that given the objections raised by the community that the government continually keep itself apprised of issues relating to the measure and possible ways of addressing these<sup>784</sup>. In its report the committee justified this by stating that:

“the non-trans spouse does have a legal right to be consulted if it is proposed to change the terms of the marriage contract in consequence—and this right must also be given due weight”<sup>785</sup>

This wording, which defends the existence of a right to be consulted is somewhat unusual, as the measure in question is more than a right to be consulted, it is a right to deny someone gender recognition. As such it may be that, if this wording can be seen as indicative of the view of the committee, and of those who support this measure in general, that reform which gains approval of those who support this measure may be possible provided that in some way the spouse is given some form of right to consultation which does not involve denying their partner their rights.

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<sup>783</sup> *Hamalainen v Finland* (37359/09) paragraphs 9-11 of the dissent

<sup>784</sup> Transgender equality, first report of the session 2015-2016 HC 390 Published on 14 January 2016, International Commission of Jurists (ICJ), Located at <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf> paragraph 63

<sup>785</sup> Transgender equality, first report of the session 2015-2016 HC 390 Published on 14 January 2016, International Commission of Jurists (ICJ), Located at <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf> paragraph 62



Recently there have been a number of cases brought regarding practices in the UK relating to the treatment of transgender people. *R(on the application of JK) v Registrar General for England and Wales* concerned the ongoing practice of recording transgender women as a child's "father" on that child's birth certificate, regardless of if that person has a gender recognition certificate<sup>786</sup>. While the court did make an important statement in paragraph 71 of its judgement:

"It is now uncontroversial that gender identity is an integral and important part of an individual's fundamental identity, and thus of that individual's private life. "<sup>787</sup>

This is in line with the recent judicial treatment of the subject since the *Goodwin* case. However, the court found that there was no violation of article 8 of the ECHR, even though article 8 was clearly engaged. There was a factual disagreement on how often producing the long form birth certificate, which is the document which would name her as the father, would have to be produced, with the government stating it would almost never be necessary<sup>788</sup>. The court found that such instances would be rare and that, because in such instances the information would be given to someone in a professional capacity, it would be "inconceivable" for such a person to disclose someone's transgender status<sup>789</sup>. The court pointed out that the rights of the child to know who their "biological father" is should also be considered<sup>790</sup>. As such the court found that any interference with article 8 was justified, due to the rights of the child, as well as the interference being minimal, as well as the lack of a ECHR judgement on the issue and the lack of European consensus on the issue<sup>791</sup>.

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<sup>786</sup> *R(on the application of JK) v Registrar General for England and Wales* [2015] H.R.L.R. 10; [2015] A.C.D. 91

<sup>787</sup> *R(on the application of JK) v Registrar General for England and Wales* [2015] H.R.L.R. 10; [2015] A.C.D. 91 paragraph 71

<sup>788</sup> *R(on the application of JK) v Registrar General for England and Wales* [2015] H.R.L.R. 10; [2015] A.C.D. 91 paragraph 81

<sup>789</sup> *R(on the application of JK) v Registrar General for England and Wales* [2015] H.R.L.R. 10; [2015] A.C.D. 91 paragraph 87

<sup>790</sup> *R(on the application of JK) v Registrar General for England and Wales* [2015] H.R.L.R. 10; [2015] A.C.D. 91 paragraph 112

<sup>791</sup> *R(on the application of JK) v Registrar General for England and Wales* [2015] H.R.L.R. 10; [2015] A.C.D. 91 paragraph 123

The Gender Recognition Act itself was challenged in *Carpenter v Secretary of State for Justice* on the grounds that it violated article 8 rights of transgender people seeking gender recognition<sup>792</sup>. In this case the applicant was a post-operative transgender woman who applied for a gender recognition certificate. Despite receiving the certificate she alleged that section 3(3) of the Gender Recognition Act was incompatible with his article 8 right to a private and family life<sup>793</sup>. The section in question states that the evidential requirements for an application are not satisfied if the applicant is receiving medical treatment for the purpose of modifying sexual characteristics, unless the statements required from medical professionals as a part of the application include details of that treatment<sup>794</sup>. The applicant argued that this constituted a violation of her right to a private life, as it required her to disclose personal medical details for a purpose which was not necessary or proportionate in a democratic society<sup>795</sup>. She also alleged that this violated article 14 of the ECHR<sup>796</sup> as it discriminated against her on the grounds of “other status”. In this case the status of being a postoperative transgender woman<sup>797</sup>. The court found that this was not the case, on the grounds that if such information were withheld the panel would be making its decision on incomplete information which is required due to the far reaching impacts of granting or denying an application<sup>798</sup>. It is interesting to note that it was pointed out in this case that a person may still receive a recognition certificate having had no such treatment. While it is true that the decision without this information would be based on incomplete information, it is questionable whether this would pose a problem. This information is not decisive or even strictly necessary in the process of granting or denying an application, except that it is mandated by the statute. Despite this the court found that the evidential requirement in section 3(3) was not incompatible with the ECHR<sup>799</sup>.

*MB v Secretary of State for Work and Pensions*<sup>800</sup> concerns a transgender woman who married her partner after the passage of the Gender Recognition Act but before it was

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<sup>792</sup> *Carpenter v Secretary of State for Justice* [2015] 1 W.L.R. 4111

<sup>793</sup> *Carpenter v Secretary of State for Justice* [2015] 1 W.L.R. 4111, para 1

<sup>794</sup> Gender Recognition Act 2004 Section 3 (3)

<sup>795</sup> *Carpenter v Secretary of State for Justice* [2015] 1 W.L.R. 4111, para 13

<sup>796</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Article 14

<sup>797</sup> *Carpenter v Secretary of State for Justice* [2015] 1 W.L.R. 4111, para 13

<sup>798</sup> *Carpenter v Secretary of State for Justice* [2015] 1 W.L.R. 4111, para 24

<sup>799</sup> *Carpenter v Secretary of State for Justice* [2015] 1 W.L.R. 4111, paras 28 and 36

<sup>800</sup> *MB v Secretary of State for Work and Pensions* [2017] 1 C.M.L.R. 13

amended by the Marriage (Same Sex Couples) Act. As such she was issued an interim gender recognition certificate, however neither she nor her wife wanted to dissolve the marriage. As such her legal gender is still considered to be male. She then applied for a state pension at 60, which was at that time the state pension age for women. Her application was refused, as she was still legally deemed to be a man. She then brought the case alleging a violation of directive 79/7<sup>801</sup>, which requires that states treat men and women equally. In particular she claimed that as someone with an interim certificate has otherwise met all the necessary gender recognition criteria, it is unlawful discrimination to refuse such recognition to married applicants. The Supreme Court found itself divided on the issue, and found that even though article 7.1 (a) of the directive permits a state to set differing pension ages, it is not clear if it is permitted to make a distinction between people who have had valid gender recognition and those who have been denied that recognition due to being married<sup>802</sup>. As such the case was referred to the ECJ on the question on whether this is permitted. The ECJ ultimately found that the Gender Recognition Act was discriminatory and in violation of directive 79/7, as the UK requires transgender people to annul their marriage to access their full state pension if they are transgender, but does not require the case of cisgender people<sup>803</sup>.

Related to this case is *P v P*<sup>804</sup>. This case concerned a transgender man, who married a cisgender woman prior to receiving a gender recognition certificate. The court confirmed that, as per *Corbett v Corbett*, he was considered a woman for the purposes of marriage<sup>805</sup>. However the court also found that it was not empowered to make a declaration of nullity, as was done in *Corbett*, as same-sex marriage was now legal, the court was not able to declare the marriage void, even though it would not have been legally valid at the time of the ceremony<sup>806</sup>. The court also stated that “In the absence of a GRC, under domestic law, AP's legal sex is and always has been female”. This may contradict the notion, explained previously<sup>807</sup>, that a person's legal gender in the UK may vary based on the purpose for which their gender is being recognised. However it should be noted that, like *Corbett*, this case was only concerned with marriage. As such this statement could be read as simply being a brief way of stating that the person's sex for the purpose of marriage was female.

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<sup>801</sup> Directive 79/7/EEC, Celex No. 379L0007, OJ 1979 L6/24

<sup>802</sup> *MB v Secretary of State for Work and Pensions* [2017] 1 C.M.L.R. 13 para 18

<sup>803</sup> *MB v Secretary of State for Work and Pensions* (C-451/16) [2019] 1 C.M.L.R. 4

<sup>804</sup> *P v P* (Transgender Applicant for Declaration of Valid Marriage) [2019] EWHC 3105 (Fam)

<sup>805</sup> *P v P* (Transgender Applicant for Declaration of Valid Marriage) [2019] EWHC 3105 (Fam), paragraph 53

<sup>806</sup> *P v P* (Transgender Applicant for Declaration of Valid Marriage) [2019] EWHC 3105 (Fam), paragraph 75

<sup>807</sup> Discussion of this begins at page 125

Regardless of the intent of the statement, as this case is, like *Corbett*, about marriage, it appears to be a proper reading to confine its finding of a person's legal sex also to marriage as was done in *Corbett*.

Another notable recent case is *R. (on the application of C) v Secretary of State for Work and Pensions*<sup>808</sup>. This case concerns a transgender woman who had obtained a gender recognition certificate, but found that records of her previous gender were still present at the Department of Work and Pensions and visible to employees in the Department. When the case was heard at first instance it was DWP policy to record a person's name, sex, title and any previous sex, name and title. It also included a field which stated whether a person had received a gender recognition certificate. That field was removed before the appeal was heard, however the rest of the information is still present, making determining who has received a gender recognition certificate, and thus who is transgender, a simple matter of deduction<sup>809</sup>. The court agreed that the retention of this information engages article 8, however the issue was if this retention was justified<sup>810</sup>. The government stated that the law was justified on three grounds: to inform policy, to calculate state pensions and to enable fraud detection. The first ground was found to be illegitimate at first instance, so the government no longer sought to rely on it<sup>811</sup>. The second ground exists because state pensions are paid on the basis of contributions, and how this effects how many contributions must be made and how a person will be paid depends on a person's gender while making the contributions, whereas other characteristics, such as state pension age, depend on a person's gender when making the claim<sup>812</sup>. The third ground was claimed to be justified as two cases had occurred of fraud linked to gender recognition certificates, and a person attempting to take on someone else's pre-transition identity<sup>813</sup>. The case also concerned a system known as SCR, whereby data concerning people who have had a gender recognition certificate must be processed in a certain way, this takes more time and may cause delays, it was also claimed that this system does not protect transgender people, instead it singles them out and draws attention to them<sup>814</sup>. The court found that the data retention policy was proportionate to achieve the two aims the government relied upon, as it

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<sup>808</sup> *R. (on the application of C) v Secretary of State for Work and Pensions* [2016] P.T.S.R. 1344

<sup>809</sup> *R. (on the application of C) v Secretary of State for Work and Pensions* [2016] P.T.S.R. 1344 paragraph 5

<sup>810</sup> *R. (on the application of C) v Secretary of State for Work and Pensions* [2016] P.T.S.R. 1344 paragraph 6

<sup>811</sup> *R. (on the application of C) v Secretary of State for Work and Pensions* [2016] P.T.S.R. 1344 paragraph 8

<sup>812</sup> *R. (on the application of C) v Secretary of State for Work and Pensions* [2016] P.T.S.R. 1344 paragraph 9

<sup>813</sup> *R. (on the application of C) v Secretary of State for Work and Pensions* [2016] P.T.S.R. 1344 paragraph 10

<sup>814</sup> *R. (on the application of C) v Secretary of State for Work and Pensions* [2016] P.T.S.R. 1344 paragraph 27

found that it could reasonably be believed that fraud detection would be improved if front line staff have access to historical gender information<sup>815</sup>. The court also found that while the SCR system may cause some delays, these delays are not restricted just to transgender people, and that the existence of the SCR system is designed to pursue a legitimate aim, and that while it may cause attention to be drawn to a transgender person, the historical gender information may cause that anyway, and a person can opt out of the system, as such it was not a violation of article 8<sup>816</sup>. The court also agreed with the court of first instance that there was no evidence that these policies impacted transgender persons disproportionately when compared to non-transgender users of the SCR system<sup>817</sup>. The court also found against the argument that section 9 of the Gender Recognition Act was breached, as the claimant was not treated “for all purposes” as a woman, as the court stated that this should not be interpreted as to require a person to “re-write history”<sup>818</sup>. This case was appealed to the Supreme Court, which agreed with the conclusions of the High Court, in that while there was some interference with the right to privacy, it was in pursuit of a legitimate aim<sup>819</sup>. The Supreme Court also agreed that sections 9 and 22 of the Gender Recognition Act do not require the destruction of prior information, although section 22 does bar its disclosure in certain circumstances<sup>820</sup>.

The recent case of *R (on the application of McConnell) v Registrar General*<sup>821</sup> concerned one of the less obvious forms of gender recognition. While this case was about birth certificates, it concerned whether a trans man must be referred to as “mother” on the birth certificate of a child to whom he has given birth<sup>822</sup>. This case is particularly interesting as the appellant in this case (the transgender man) had obtained a gender recognition certificate, which, as discussed previously, is described as changing one’s legal gender “for all purposes”. However in addition to the “for all purposes” language in section 9 of the Gender Recognition Act, this case also concerned section 12, which states that:

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<sup>815</sup> *R. (on the application of C) v Secretary of State for Work and Pensions* [2016] P.T.S.R. 1344 paragraph 60

<sup>816</sup> *R. (on the application of C) v Secretary of State for Work and Pensions* [2016] P.T.S.R. 1344 paragraphs 68-69

<sup>817</sup> *R. (on the application of C) v Secretary of State for Work and Pensions* [2016] P.T.S.R. 1344 paragraph 75

<sup>818</sup> *R. (on the application of C) v Secretary of State for Work and Pensions* [2016] P.T.S.R. 1344 paragraph 79

<sup>819</sup> *R. (on the application of C) v Secretary of State for Work and Pensions* [2017] 1 W.L.R. 4127 paragraph 37

<sup>820</sup> *R. (on the application of C) v Secretary of State for Work and Pensions* [2017] 1 W.L.R. 4127 paragraph 36

<sup>821</sup> *R (on the application of McConnell) v Registrar General* [2020] EWCA Civ

<sup>822</sup> *R (on the application of McConnell) v Registrar General* [2020] EWCA Civ, para 1

“The fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.”<sup>823</sup>

The appellant contended that this section of the Act referred to “status of the person as the father or mother of the father” in terms of assuring that the rights and responsibilities obtained by a person due to that status would not be altered or interrupted<sup>824</sup>. The court did not agree with this interpretation, noting that it originated from the Explanatory Notes of the Gender Recognition Act, stating:

“Our task is to construe what Parliament has enacted, not what the Explanatory Notes say it enacted.”<sup>825</sup>

The court explained that section 12 should be regarded as both retrospective and prospective, meaning that a gender recognition certificate should have no effect on one’s existing status as a mother or father when obtaining the certificate, nor on one’s future status once one has already received the certificate<sup>826</sup>.

The court did not address the meaning of the word “mother” specifically in a great deal of detail, other than to say that at common law it is held to mean “person who gives birth”, which was discussed at first instance to be supported mainly by *The Ampthill Peerage* case<sup>827</sup> which stated that “Motherhood, although also a legal relationship, is based on a fact, being proved demonstrably by parturition.”<sup>828</sup>

The court also addressed the idea that the statute, and the word “mother” specifically should be interpreted in line with contemporary social and moral norms, by stating that this had already been done at first instance by defining motherhood as relating to the act of giving birth rather than a reference to gender and that interpreting it otherwise would be akin to defining the word “dog” as meaning cats<sup>829</sup>. The court also stated that allowing the use of an additional word such as “gestational parent” would not be acceptable, as it would amount to judicial legislation rather than interpretation<sup>830</sup>. The court did acknowledge that the word

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<sup>823</sup> Gender Recognition Act 2004 Section 12

<sup>824</sup> R (on the application of McConnell) v Registrar General [2020] EWCA Civ, para 36

<sup>825</sup> R (on the application of McConnell) v Registrar General [2020] EWCA Civ, para 37

<sup>826</sup> R (on the application of McConnell) v Registrar General [2020] EWCA Civ, paras 29-33

<sup>827</sup> R. (on the application of TT) v Registrar General for England and Wales [2020] Fam. 45, para 106

<sup>828</sup> *The Ampthill Peerage* [1977] AC 547, 577

<sup>829</sup> R (on the application of McConnell) v Registrar General [2020] EWCA Civ, para 35

<sup>830</sup> *Ibid*

“mother” as not totally de-coupled from gender, is its usage remained connected to a persons gender assigned at birth due to the exception of section 9 of the GRA contained in section 12<sup>831</sup>.

This case also addressed the question as to whether section 12 of the GRA and the court’s interpretation of it in this case violate article 8 of the European Convention on Human Rights concerning the right to a private and family life<sup>832</sup>. The court found that this right was engaged by section 12, as it created a similar interference in a person’s life to that in *Goodwin*, as it results in a document that will result in a person’s transgender status being revealed, which will necessarily interfere with their private life<sup>833</sup>. The court found, however, that this interference was justified and proportional, and thus not a violation of article 8<sup>834</sup>. This conclusion was reached for a number of reasons, in particular the fact that the words mother and parent have specific meanings in various pieces of legislation<sup>835</sup> and that there was currently no consensus among the Council of Europe on this issue<sup>836</sup>, and no supporting judgement from the European Court of Human Rights<sup>837</sup>.

Although this case may be regarded as an example of the complexities of one of the less obvious situations in which gender recognition may occur, it revolved largely around the specifics of section 12 of the Gender Recognition Act. Because of this, while it is an interesting case, and certainly an important one in the UK, its reasoning may not be applicable to other jurisdictions, although many will inherit the common law definition of the word “mother” referred to in this case. It does however demonstrate the interactions between common law and statute, and how these can lead to a result which may be unpleasant for those involved. As such this case may serve as a reminder of the need to examine the many “moving parts” of a legal system and how they may interact. As discussed elsewhere in this thesis, other jurisdictions have amended their statutes to avoid the difficulties raised in this case<sup>838</sup>.

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<sup>831</sup> R (on the application of McConnell) v Registrar General [2020] EWCA Civ, para 52

<sup>832</sup> R (on the application of McConnell) v Registrar General [2020] EWCA Civ, para 51

<sup>833</sup> R (on the application of McConnell) v Registrar General [2020] EWCA Civ, para 55

<sup>834</sup> R (on the application of McConnell) v Registrar General [2020] EWCA Civ, para 89

<sup>835</sup> R (on the application of McConnell) v Registrar General [2020] EWCA Civ, paras 63-71

<sup>836</sup> R (on the application of McConnell) v Registrar General [2020] EWCA Civ, para 79

<sup>837</sup> R (on the application of McConnell) v Registrar General [2020] EWCA Civ, para 72

<sup>838</sup> See discussion of Tasmania beginning at page 58

## Intersex individuals:

It may seem as though statute law in the UK ignores the existence of non-binary sex category. It uses language such as “opposite sex” and referring to sex discrimination as relating only to those categorised as men and women. However, intersex people are not left totally abandoned and outside of legal categories by the law in the UK. The law regarding intersex people in the UK comes mostly from case law, particularly the case of *W v W*<sup>839</sup>. This case concerned a woman who had been raised as a boy. She began to develop breasts and was forcibly given testosterone treatment, and fled home when her father threatened to increase the dosage. She eventually began receiving female hormones and had sexual reassignment surgery. She then married Mr W, who would later divorce her. When she announced her intent to file for ancillary relief, in response Mr W sought a decree that the marriage was void from the start, as it was not one between a man and a woman<sup>840</sup>. It was revealed that she (the respondent) had, prior to surgery, genitals which were “abnormal”<sup>841</sup>. The court, based on the expert testimony available, concluded that the respondent had a male chromosomal sex, and likely had a male gonadal sex, but never had a “normal” penis, and had lived in a female social role for as long as they had been able to choose<sup>842</sup>. The court referred to the *Corbett* case extensively, as well as an address Ormrod J had given which referred to how difficult the *Corbett* case would have been if the case had been of “testicular failure syndrome” rather than of transsexualism<sup>843</sup>. The court concluded that the test set out in *Corbett* could not be satisfied, and so the respondent could not be said to be male for the purposes of marriage<sup>844</sup>. However it was also found that it would be wrong to consider someone who does not satisfy the Corbett test to be neither man or woman, as it would be contrary to human rights and that: “Further, in my judgement such a result would create as many problems as it solved in the difficulties that already exist in defining a woman or a man, or a male or a female, for the purposes of marriage by creating a third category the boundaries of which would not be clear.”<sup>845</sup>

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<sup>839</sup> *W v W* (Physical Inter-Sex) [2001] Fam 111

<sup>840</sup> *W v W* (Physical Inter-Sex) [2001] Fam 111 at 114

<sup>841</sup> *W v W* (Physical Inter-Sex) [2001] Fam 111 117 para 3

<sup>842</sup> *W v W* (Physical Inter-Sex) [2001] Fam 111 120 para 6

<sup>843</sup> *W v W* (Physical Inter-Sex) [2001] Fam 111 140 para 2

<sup>844</sup> *Ibid*

<sup>845</sup> *W v W* (Physical Inter-Sex) [2001] Fam 111 144 para 2



Ultimately the court found that the respondent could be considered to be a woman for the purposes of marriage. The court reiterated that the *Corbett* test is the one that should be used to determine sex for the purpose of marriage, but that it is possible for people with intersex conditions to not be categorized using that test, and that no one criteria, such as chromosomal sex, should be given more importance than any other<sup>846</sup>. There are two points made in the conclusion of this judgement which are particularly interesting. The first is that significant weight is given to the respondents “final choice” to live as a woman<sup>847</sup>. This seems to express that a person should, at least if their physical sex is ambiguous, be able to assert their gender as a matter of choice. This is particularly noteworthy as this judgement comes three years before the Gender Recognition Act would be introduced. The second interesting feature of the conclusion is expressed in the following quote:

“Their assignment to a sex or gender in which they are to be brought up and live is a difficult one and it seems to me that in such cases (and in other cases where a decision as to the sex or gender in which a child should be brought up falls to be made by doctors and others) there is considerable force in the argument that it would be best to “wait and see”. How long it would be appropriate to wait, and what tests would be appropriate, would vary from case to case.”<sup>848</sup>

This is interesting because the law in the UK places a limit on how long doctors can “wait and see”, the upper limit being 41 days<sup>849</sup>, and only 21 days in Scotland<sup>850</sup>. After this a child must be assigned as male or female. Perhaps indicating a prioritisation of certainty as to a person’s sex over the wellbeing concerns which are caused by early and arguably unnecessary sex assignation in the case of intersex infants.

It has been pointed out that, in addition to applying to intersex people, a number of aspects of the reasoning in *WvW* could be applied to gender recognition as applied to transgender people<sup>851</sup>. In particular the fact that the judgement in *WvW* acknowledges that gender identity should not be fixed at birth and not based on any given physical characteristic have been pointed to as being grounds for believing that *WvW* is not compatible with *Corbett v*

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<sup>846</sup> *W v W* (Physical Inter-Sex) [2001] Fam 111 141 para 4

<sup>847</sup> *W v W* (Physical Inter-Sex) [2001] Fam 111 146 para 3

<sup>848</sup> *W v W* (Physical Inter-Sex) [2001] Fam 111 146 para 1

<sup>849</sup> Births and Deaths Registration Act 1953 section 2

<sup>850</sup> Registration of Births, Deaths and Marriages (Scotland) Act 1965 Section 14

<sup>851</sup> Defining, Assigning and Designing Sex, P.-L. Chau, Jonathan Herring, International Journal of Law, Policy and the Family, Volume 16, Issue 3, December 2002, Pages 327–367

*Corbett*<sup>852</sup>. While the Gender Recognition Act now allows a person's gender to be recognised other than the gender assigned at birth for all purposes<sup>853</sup>, and modern practice has moved away from the approach taken in *Corbett*, it is worth noting that it is still the law of the land with regards to gender recognition for certain purposes prior to the receipt of a gender recognition certificate. As such, these arguments as to why *WvW* may prompt us to revise the principle set down in *Corbett* may be kept in mind as we are faced with more opportunities to diverge from *Corbett*.

As a result of *WvW*, while the UK does not make any specific provision for intersex persons in any of its gender recognition or discrimination law, they can exist within the current framework, as they are assigned to one sex based, at least partly, on how they choose to live their lives. However, while a person does have an element of choice, it is possible that an intersex person may find themselves “locked in” to a recognised gender/sex (as they are the same in UK law) that they have lived in for some time, much as how a person who was not born with an intersex condition is considered to be the sex/gender they are assigned at birth. Such a person would then have to use the same gender recognition process as someone who was not born with an intersex condition, although there has been no test case on this issue.

While the law for transgender and intersex people appears to have diverged in the UK into two separate “streams”, with intersex people permitted to “choose” the gender they are recognised as per *W v W*<sup>854</sup>, while transgender people must use the Gender Recognition Act or associated mechanisms, it is worth noting that these were not always thought of as separate issues. The report of the working group on transsexual people released in April 2000<sup>855</sup> contains a number of mentions of trans people being likened to intersex people. The report mentions that there is a growing body of evidence to state that being transgender should be considered one of the many intersex conditions that exist<sup>856</sup>. It includes a statement from an

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<sup>852</sup> Defining, Assigning and Designing Sex, P.-L. Chau, Jonathan Herring, International Journal of Law, Policy and the Family, Volume 16, Issue 3, December 2002, Pages 327–367, Pages 347 and 349

<sup>853</sup> Gender Recognition Act 2009, Section 9

<sup>854</sup> *W v W* (Physical Inter-Sex) [2001] Fam 111 146 para 3

<sup>855</sup> Report of the Interdepartmental Working Group on Transsexual People, April 2000, Located at [http://webcache.googleusercontent.com/search?q=cache:\\_wwlG1k\\_tFAJ:www.oocities.org/transforum2000/Resources/wgtrans.pdf+&cd=1&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:_wwlG1k_tFAJ:www.oocities.org/transforum2000/Resources/wgtrans.pdf+&cd=1&hl=en&ct=clnk&gl=uk) accessed 10/01/2020

<sup>856</sup> Report of the Interdepartmental Working Group on Transsexual People, April 2000, Located at [http://webcache.googleusercontent.com/search?q=cache:\\_wwlG1k\\_tFAJ:www.oocities.org/transforum2000/Resources/wgtrans.pdf+&cd=1&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:_wwlG1k_tFAJ:www.oocities.org/transforum2000/Resources/wgtrans.pdf+&cd=1&hl=en&ct=clnk&gl=uk) accessed 10/01/2020, page 36

expert stating that “Thus, I am obliged to advise that if a legal action were taken by the transsexual community, to assert their right to transsexualism being considered to be an intersex condition, then it would undoubtedly win.”<sup>857</sup>. This consideration of being transgender as a form of being intersex appears to be based on the understanding developing at the time that being transgender is not a choice, and it cannot be prevented or reversed by psychotherapy, and as such must be down to some unalterable aspect of the structure of the brain, and therefore, an intersex condition<sup>858</sup>. While in practice the approach taken in the case of transgender people in practice since this report has differed to the approach taken with intersex people it is interesting to observe a point where, in the thinking of the government, or at least a working group, these two issues were one and the same.

Given this, why is it that such different approaches have been taken in the cases of transgender and intersex people? While it may not be possible to provide a definitive answer, there are a number of possible explanations.

One possible explanation is that the concepts of transsexuality and intersexuality remained separate due to the use of explanations of transsexuality as being mental and social, in contrast with intersex conditions which are always understood as being physical<sup>859</sup>. This explanation depends on an understanding of the mental and physical as being separate, a view which appears to be contradicted by ever increasing amounts of evidence<sup>860</sup>. However, despite the poor evidential basis for this view of the mind and body, these explanations are still used for the sake of ease and clarity, as being transsexual does not impact one’s phenotype. This conceptual separation between the mind and body and thus transsexuality and intersex status may have impacted how transsexuality is perceived. It can be observed through physical examination if a person has an intersex condition, however, given current

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<sup>857</sup> Report of the Interdepartmental Working Group on Transsexual People, April 2000, Located at [http://webcache.googleusercontent.com/search?q=cache:\\_wwlG1k\\_tFAJ:www.oocities.org/transforum2000/Resources/wgtrans.pdf+&cd=1&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:_wwlG1k_tFAJ:www.oocities.org/transforum2000/Resources/wgtrans.pdf+&cd=1&hl=en&ct=clnk&gl=uk) accessed 10/01/2020, page 42

<sup>858</sup> Report of the Interdepartmental Working Group on Transsexual People, April 2000, Located at [http://webcache.googleusercontent.com/search?q=cache:\\_wwlG1k\\_tFAJ:www.oocities.org/transforum2000/Resources/wgtrans.pdf+&cd=1&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:_wwlG1k_tFAJ:www.oocities.org/transforum2000/Resources/wgtrans.pdf+&cd=1&hl=en&ct=clnk&gl=uk) accessed 10/01/2020, page 40

<sup>859</sup> Understanding gender diversity: sex and gender are not the same thing, Fred McConnel, The Guardian, 7/02/2014. Located at <https://www.theguardian.com/media/mind-your-language/2014/feb/07/mind-your-language-transgender>, accessed 18/01/2020

<sup>860</sup> Fausto-Sterling, A. (2012). Sex/gender: Biology in a social world, (Routledge series integrating science and culture). page 67 para 3

technology the same cannot be done for a transgender person due to the complexity of the brain. Although some studies have indicated differences in brain structure between transgender and cisgender persons, there is not currently a brain scan that can determine if a person is transgender. Hence it may be that transsexuality being seen as rooted in the mind came to be seen as less empirically observable and thus less real in some senses than being intersex. This can be seen in current rhetoric against transgender people, which portrays transgender people as believing that gender is “just a feeling” due to it being rooted in the brain<sup>861</sup>. As such it may be that transgender people came to be seen as requiring special confirmation of their status, thus the need for gender recognition panels to confirm that a person is, in fact, the gender that they say they are. This view is still espoused by those who oppose “self-identification” models of gender recognition, who claim that expert evidence should be required to change a person’s legal gender<sup>862</sup>. It must be noted that, despite this opposition self-identification models remain regarded as best practice<sup>863</sup>. This is in part due to the fact that any expert confirmation of a person’s gender identity is not based on any sort of scan or physical examination, it relies solely on the account of the transgender person themselves. As such self-recognition models are regarded as allowing a person to rely directly on their account of their own identity rather than needing to tell a practitioner first and be subjected to unnecessary questioning, which can be regarded as invasive and “deeply traumatic and stressful”<sup>864</sup>.

Another possible explanation, which may most closely match reality when combined with the first explanation, although each may have explanatory power on their own, is that the two “paths” do not diverge as much as it may at first appear. As previously discussed, the case of Corbett sets out three ways in which the law may interact with gender, with most laws that involve gender being situated in the “relevant” category. This category is characterised by being negotiable and variable. In practice this means that the vast majority of legal

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<sup>861</sup> Kathleen Stock: life on the front line of transgender rights debate, Jack Grove, Times Higher Education, 7/01/2020, Located at <https://www.timeshighereducation.com/news/kathleen-stock-life-front-line-transgender-rights-debate>, accessed 18/01/2020, paragraph 7

<sup>862</sup> Gender identity needs to be based on objective evidence rather than feelings, Debbie Hayton, Open Future, The Economist, 3/7/2018 Located at <https://www.economist.com/open-future/2018/07/03/gender-identity-needs-to-be-based-on-objective-evidence-rather-than-feelings>, accessed 18/01/2020

<sup>863</sup> TGEU Best Practice Catalogue, 22/02/2017, Located at <https://tgeu.org/human-rights-gender-identity-best-practice-catalogue/>, Accessed 18/01/2020

<sup>864</sup> Statement on gender recognition, Scottish Government, 20/06/2019, Located at <https://www.gov.scot/publications/statement-gender-recognition/>, accessed 18/01/2020, paragraph 7

mechanisms a transgender person interacts with can recognise their gender identity long before a gender recognition certificate is required, as depicted in the graphic contained in this Equalities Office factsheet<sup>865</sup>. Because of this, most gender recognition is independent from the mechanisms contained in the Gender Recognition Act. As such it may be that, much as intersex people are permitted to choose a gender in which they live their lives, transgender people are also capable of this, with the act of choosing simply living one's gender authentically and having it recognised by the various relevant organisations and individuals. While the Gender Recognition Act does represent a point of separation for the two "paths", because it does not have a great deal of impact on a person's everyday life, it is possible to see the two paths as only separated by a narrow margin, rather than being governed by wholly separate legal regimes.

#### Gender recognition in practice:

While the law mentioned up to this point in this chapter focuses on gender recognition on birth certificates and for the purposes of marriage and for purposes of discrimination, a number of other areas of law in the UK do interact with a person's gender and sex, and have different ways of recognising these, despite the attempted creation of a "legal gender" which would be effective in every area of life by the Gender Recognition Act. Of particular interest are other documents such as passport on which gender and sex are recorded, as well as how gender and sex are categorized in prisons.

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<sup>865</sup> Trans People in the UK, Government Equalities Office, Located at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721642/GEO-LGBT-factsheet.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721642/GEO-LGBT-factsheet.pdf), accessed 18/01/2020

## Passports:

In terms of documents on which gender is recognised, the two documents most often used are passports and driver's licenses.

The UK does allow a change of gender on its passports. To do so an applicant must cancel their existing passport and apply for a new one in the relevant gender. Additional information must be submitted, and an applicant must either show that they have a gender recognition certificate, a birth certificate in the relevant gender (presumably acquired through a gender recognition measure in another jurisdiction) or a letter from a doctor to confirm that their change of gender is most likely permanent, as well as evidence of any change of name<sup>866</sup>. This last criterion is of particular interest, as it allows a person to apply for a passport in a gender that they do not have recorded on their birth certificate, nor do they have a gender recognition certificate. This is important for two reasons. Firstly the current passport policy, allows a person's gender to be recognised on a passport more easily than they can acquire a recognition certificate, as the recognition certificate has the additional requirement of "living in the acquired gender" for at least two years, and requires one more medical report than having one's gender recognised on a passport. Secondly it is noteworthy because the Gender Recognition Act states that a person's legal gender becomes the gender recognised on the recognition certificate for all purposes<sup>867</sup>. There is no other piece of legislation or instrument that refers to this state of "legal gender" and the Gender Recognition Act does not state what a person's "Legal Gender" ought to be considered to be before a person receives a gender recognition certificate.

Because of this one might assume, although it is not made explicit in the act, that a person's legal gender is that recorded on their birth certificate until such a time that they receive a gender recognition certificate. As such a person could have a gender recognised on their passport which is not their "legal gender". The legal implications of this are unclear.

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<sup>866</sup> Applying for a passport: Additional information for transgender and transsexual customers, HMPO 20 10.13, HM Passport Office, Located at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/251703/Applying\\_for\\_a\\_passport\\_additional\\_information.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251703/Applying_for_a_passport_additional_information.PDF), accessed 17/01/2021

<sup>867</sup> Gender Recognition Act 2004 section 9 (1)

However, this is most likely not the case. As mentioned above the categorisation of the law relating to gender discussed in *Corbett v Corbett* is particularly helpful in understanding modern gender recognition law. As discussed earlier in this chapter, the Corbett case divides the law into three categories: cases where gender is irrelevant, those where the law is relevant but not essential, and those where the law is essential. The category of situations where gender is relevant but not essential makes up the bulk of the law and is distinguished by being negotiable and variable between different purposes<sup>868</sup>. Given this the wording of the Gender Recognition Act, which states that upon receipt of a gender recognition certificate a person's legal gender is set to the recognised gender "for all purposes"<sup>869</sup> can be more easily understood. This language is used because up until that point a person's recognised gender can vary from purpose to purpose and these varying genders are all rendered uniform by the receipt of a gender recognition certificate. If this is the correct interpretation of the Act and of *Corbett* then the situation regarding passports becomes much more clear.

If understood with regards to the classification of laws in *Corbett* then the gender recognition mechanisms used in the case of passports can be seen as simply one of the many purposes for which a person's gender can be recognised. For a person who does not have a gender recognition certificate a passport is simply one of the many purposes for which their gender can be recognised. In this case, as with all other situations in the "relevant" category, the recognising party, in this case the passport office, is free to set whatever criteria it wishes for gender recognition. The fact that the required criteria are lesser than those required by the Gender Recognition Act causes no conflict.

If the notion of multiple recognised legal genders, each for a different purpose is, in fact, not a true representation of law in England and Wales as suggested by Lord Bingham in *A v Chief Constable of West Yorkshire*<sup>870</sup> then the situation becomes more complicated.

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<sup>868</sup> *Corbett v Corbett* (Otherwise Ashley) [1971] P. 83 At 105 para 2

<sup>869</sup> Gender Recognition Act 2004 section 9 (1)

<sup>870</sup> *A v Chief Constable of West Yorkshire* [2004] UKHL 21 paragraph 3

According to this model if the gender recorded on a passport is intended to be or could reasonably be considered to be a representation of a person's "legal gender" then it is possible that applying for a passport if one does not have a recognition certificate could be considered somehow fraudulent. Fraud by false representation seems the closest match to this situation, but that offence would require the applicant to be intending to make some form of gain from the false representation<sup>871</sup>. While there is nothing obvious, it is hypothetically possible that the benefit simply from having a document that recognises one's lived experience of one's gender could be considered some form of gain, but this does not seem particularly likely.

Beyond the consideration of what it practically means for a trans person who has a passport recognising one gender, but a birth certificate recognising another is that if a birth certificate is said to be a source of "legal" gender, there are also a number of other issues that are raised. In particular, if a birth certificate is representative of one's "legal gender" at all times, why is it that a passport can recognise a different identity?

There seem to be two probable explanations. The first is that passports recognise something other than legal gender, and the second is that this apparent conflict is unintentional and is indeed a real conflict of gender recognition systems.

It may be that there is no genuine conflict as, despite appearances, a passport is not intended to be a representation of a person's legal gender. If one is to suppose that birth certificates are the sole, constant authoritative source for legal gender, then the most convincing argument for birth certificates representing something other than legal gender is simply that if this was the intent then the sole criteria for having one's gender recognised on one's passport would be receipt of a GRC. This may be the case if the intent was for a passport to represent something more akin to the social gender in which a person actually lives rather than the more rigorous criteria required for a GRC. However, it is worth noting that to amend a passport does still require a letter from a doctor<sup>872</sup>, which would be an unusual requirement if

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<sup>871</sup> Fraud Act 2006, Section 2 (1) (b) (i)

<sup>872</sup> Applying for a passport: Additional information for transgender and transsexual customers, HMPO 20 10.13, HM Passport Office, Located at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/251703/Applying\\_for\\_a\\_passport\\_additional\\_information.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251703/Applying_for_a_passport_additional_information.PDF)



the intent was to recognise social gender. It is worth noting that this doctor's letter does not require any particular treatment, so it is unlikely that this is for purposes related to intimate searches. It is difficult to find a consistent, practical reason why the requirements for passports would be less rigorous, but still require medical evidence. The most convincing possibility seems to be that the intent was to recognise a person's social, practical gender, but it was deemed that some expert opinion was necessary to avoid the possibility of deception. This explanation seems most plausible as while a doctor's letter would not be necessary on a practical level to recognise social gender, it seems plausible that it would be perceived necessary due to the perceived dangers of simply taking a person's word for it, despite the existence of sanctions for fraud.

The second possibility is that, as the passport rules were introduced after the Gender Recognition Act, that they merely represent the views on gender recognition of different governments, and, due to lack of public will or some other reason, the Gender Recognition Act has not been updated despite it not reflecting current views on gender recognition. Under this view there is a genuine conflict between these two methods of gender recognition, which would pose practical issues if the practice were ever challenged.

However it is worth noting that these explanations are only necessary if birth certificates are regarded to be the sole, constant source of legal gender, which, as discussed previously, seems unlikely to be the case due to the number of inconsistencies one must grapple with to explain actual practice under this model. However, it is a possibility worth addressing due to Lord Bingham's opinion in *A v Chief Constable of West Yorkshire*.

Because an applicant must apply for an entirely new passport in order to have their gender recognised, they must pay the relevant fee of £72.50<sup>873</sup>, which may be a financial obstacle to some transgender people with lower incomes. The UK also only recognises M (male) and F (female) as gender markers on its passports, despite X also being a valid option according to

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<sup>873</sup> Change your name or personal details on your passport, How it works, Gov.uk, Located at <https://www.gov.uk/changing-passport-information>

the international civil aviation authority<sup>874</sup>, the UK does not allow those with British passports to use that maker and does not recognise any indeterminate or non-binary status on its passports. In 2018 a judicial review case was initiated by Christie Elan-Cane alleging that this policy was unlawful, as it violated their right a private and family right under article 8 of the ECHR<sup>875</sup>. This case was later appealed, with the court confirming the judgment of the High court that while Article 8 was engaged, the policy was within the margin of appreciation and did not violate Article 8<sup>876</sup>. In its judgement the court cited an internal review conducted by the Passport Office in 2014<sup>877</sup>. This review is noteworthy as it can shed some light on the reasoning for the continued non-recognition of non-binary identities on passports. The review cites a number of issues with the recognition of non-binary genders. It discusses the relevant costs of various options, as well as the key legislative issues, particularly with regards to nationality and anti-discrimination, as the Equality Act refers only to men and women<sup>878</sup>. These legislative issues do not appear to be insurmountable, and, as a passport is not the definitive source of one's gender under the law for all purposes, they do not seem particularly relevant. The key objection within the report, which seems more decisive and arguably more problematic than the other obstacles it discusses is that of social opinion and adjustment. The report points out that:

“HMPO could introduce recognition of a third gender but it would be in isolation from the rest of government and society. There are likely to be so few applications for such a passport, but we would need to avoid issuing a document that was not recognised by other parts of government or wider UK society.”<sup>879</sup>

While the notion that the number of such applications may be limited does not make a profound argument one way or the other, this statement illustrates a key issue in gender recognition in general, that of social recognition. The report is correct in saying that the usefulness of any document which recognises something recognised by no other parts of

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<sup>874</sup> Doc 9303, Machine Readable Travel Documents, Seventh Edition, 2015, Part 4: Specifications for Machine Readable Passports (MRPs) and other TD3 Size MRTDs, International Civil Aviation Organisation, Located at [https://www.icao.int/publications/Documents/9303\\_p4\\_cons\\_en.pdf](https://www.icao.int/publications/Documents/9303_p4_cons_en.pdf) page 14

<sup>875</sup> Elan-Cane, R (on the application of) v Secretary of State for the Home Department & Anor [2018] EWHC 1530 (Admin)

<sup>876</sup> R (Christie Elan-Cane) v Secretary of State for the Home Department [2020] EWCA Civ 363 at 113

<sup>877</sup> R (Christie Elan-Cane) v Secretary of State for the Home Department [2020] EWCA Civ 363 at 14

<sup>878</sup> Gender Marking in Passports: Internal Review of Existing Arrangements and Possible Future Options, London: HMPO, 2013, available at: <http://www.complicity.co.uk/blog/wp-uploads/Gendermarkings290114.pdf>. Accessed 12/12/2020 at 6

<sup>879</sup> Gender Marking in Passports: Internal Review of Existing Arrangements and Possible Future Options, London: HMPO, 2013, available at: <http://www.complicity.co.uk/blog/wp-uploads/Gendermarkings290114.pdf>. Accessed 12/12/2020 at 4.7

government or “wider society” may cause problems or have limited usefulness. It may well be the case that recognition of non-binary genders on official documents may well best be done in a coordinated fashion. However the most important aspect of this statement appears to be the mention of wider society. Due to the nature of gender recognition in the UK being divided between various purposes, many of which are outside direct government control in most situations, it may well be the case that substantive change will need to come from the “bottom up”, led by individuals and organisations applying their own criteria. In addition to providing recognition in most situations this approach also has the advantage that it necessarily reflects the views of society, as the rules of recognition would be made by those participating in society. It would also serve as a powerful method of demonstrating a public desire for recognition of non-binary gender identities, as well as making future governmental forms of recognition easier to implement, as there would already be a social framework for them to exist within.

#### Drivers licenses:

The UK does not have a gender field on its driver’s licenses. Gender is not recorded on the relevant form, neither is sex. However, the relevant form<sup>880</sup> does include a section for a person’s title, which includes gendered title options. The government offer advice on changing one’s gender on one’s license, despite it not being a field on the license or on the application form. Although this advice is grouped together with changing one’s name and title recorded on one’s license, as they are done through the same process.

This process involves applying for a new license<sup>881</sup>, although there is no fee unless one is also having one’s photo updated<sup>882</sup>. A person must send one of the valid proof of identity

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<sup>880</sup> Application for a driving licence, D1, Driver and Vehicle Licensing Agency, Located at <https://www.pdfFiller.com/jsfiller-desk15/?requestHash=fe7e2d4d20cf46591af6bc79acaf50c8e898e39dcfa0386a1c9f586bdef43781&et=l2f&projectId=598677356#bd64c078f51a4f7ea15af0d17ea6e6d5>, accessed 12/12/2020

<sup>881</sup> Change the name or gender on your driving licence, Gov.uk, Located at <https://www.gov.uk/change-name-driving-licence>

<sup>882</sup> Driving licence fees, Gov.uk, Located at <https://www.gov.uk/driving-licence-fees>

documents that would be necessary for any application. These are: a current and valid passport, a biometric residence permit, previously known as the identity card for foreign nationals or a European Union or European Economic Area national identity card. UK birth, adoption and naturalization certificates may also be used, but additional documents must be submitted. These additional document may be: a P45, P60 or payslip, a marriage certificate or divorce papers, a photocopy of the front page of a benefits book or an original benefits claim letter, a gender recognition certificate or a college or university union card, education certificate or a PASS proof of age card<sup>883</sup>. If these documents record a person's current name or gender then these documents alone are sufficient. If a person has changed their recognised name or gender since the issue of the documents that they submit, an additional piece of evidence must be submitted. This additional information may take the form of a gender recognition certificate, a deed poll or a marriage or civil partnership certificate. A decree nisi or decree absolute may also be submitted as one of these additional documents if a person's name has changed, but must be submitted alongside a birth, adoption or naturalisation certificate<sup>884</sup>.

An alternate process exists in Northern Ireland, which is largely the same, with the main differences being that the application is sent to a different address and may also be submitted in person at one of a number of Ministry of Transport facilities<sup>885</sup>. The identity document requirements are largely the same, with the exception that birth certificates do not require additional supporting documents to be used and that birth certificates from the Republic of Ireland are valid in addition to UK birth certificates<sup>886</sup>. The guidance for those living in Northern Ireland has no section for change of gender, and has no evidence requirements listed for those whose gender has changed, nor does it list a gender recognition certificate as a document required or accepted for evidential purposes.

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<sup>883</sup> Identity documents needed for a driving licence application, Gov.uk, Located at <https://www.gov.uk/id-for-driving-licence>, paragraph 2

<sup>884</sup> Identity documents needed for a driving licence application, Gov.uk, Located at <https://www.gov.uk/id-for-driving-licence> paragraph 5

<sup>885</sup> Keeping your driving licence up to date, Ni Direct, Located at <https://www.nidirect.gov.uk/articles/keeping-your-driving-licence-date>

<sup>886</sup> Providing proof of identity for a driving licence, Ni Direct, Located at <https://www.nidirect.gov.uk/articles/providing-proof-identity-driving-licence>

Because of these requirements drivers licenses, while they do not seem overly concerned with gender, seem to de-facto have the same gender recognition requirements as passports, or gender recognition certificates if a person chooses to submit a birth certificate as evidence rather than an updated passport. The only field that denotes a person's gender, other than gendered names, is one's title if a person does not have the ability to use a non-gendered title. Titles, according to the guidance for areas other than Northern Ireland, do not require any evidence to amend on a driver's license unless the title in question is hereditary<sup>887</sup>. Because of this it is possible for a person, if they do not wish to change their name, to de-facto have a gender recognised on a driver's license with no evidence required by altering only their title.

#### Prisons:

The housing and treatment of transgender prisoners in the UK was previously governed by PSI 07/2011<sup>888</sup>, which also governed the process by which a person's gender for the purpose of their housing in prison is determined. Under the rules contained in this document the gender a person was to be treated as for the purposes of housing within prison was, by default, that persons legal gender<sup>889</sup>. This is the gender marked on a person's birth certificate or gender recognition certificate, with the gender recognition certificate overriding the gender marked on the birth certificate<sup>890</sup>. It may be interesting to note that the instructions acknowledge that prisons are not entitled to ask for a gender recognition certificate, or even ask if a prisoner has one<sup>891</sup> but still require a prisoner to produce a gender recognition certificate as evidence of their legal gender<sup>892</sup>. While the prison is not "asking", disclosure of

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<sup>887</sup> Change the name or gender on your driving licence, Gov.uk, Located at <https://www.gov.uk/change-name-driving-licence>

<sup>888</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 07/2011

<sup>889</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 07/2011 D1 - D2

<sup>890</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 07/2011 D3

<sup>891</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 07/2011 D4

<sup>892</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 07/2011, D2-D3

the presence of the certificate is still required for a person to access their rights. One could argue that while a prison would not necessarily be running afoul of legislation, there would be a form of implied “asking” taking place, much as how while a ticket barrier does not verbally ask for a ticket, the presentation of a ticket is necessary for a passenger to access their train. Under these rules if a prisoner acquires a gender recognition certificate while in prison, a multidisciplinary risk assessment must take place before they are transferred to the appropriate estate. The rules point out that due to the ruling in *(R (on the application of AB) v Secretary of State for Justice)*<sup>893</sup> that it is important to acknowledge that cisgender female prisoners are still accommodated in women's prisons even though they may have committed certain offences, including violent offences against women, as such a transgender woman should not be housed in a men's prison when a cisgender woman with their offence history would not be.

PSI 07/2011 did also allow for people to be housed according to a gender which was not their legally recognised gender, as there are a number of reasons why an otherwise eligible person would not have a gender recognition certificate<sup>894</sup>. A person may be housed and treated according to their “acquired gender” following a case conference similar to the one required to transfer someone who has received a gender recognition certificate<sup>895</sup>. However while this conference can make a recommendation, the final decision remains with the “relevant senior manager above establishment level”<sup>896</sup>. This case conference should consider if a person would otherwise meet the gender recognition criteria, as well as risk to the prisoner, risk posed to other prisoners, any input from a gender specialist or psychiatrist, where a prisoner would feel more comfortable housed, if the transfer would necessitate a period of extended segregation and if they could complete their sentence plan, including offending behaviour programmes in the other estate, as some programmes related to sexual offending may not be possible to continue<sup>897</sup>.

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<sup>893</sup> *R (on the application of AB) v Secretary of State for Justice and another* [2009] EWHC 2220

<sup>894</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 07/2011, D11

<sup>895</sup> Ibid

<sup>896</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 07/2011, D12

<sup>897</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 07/2011, D13

Another interesting feature of PSI 07/2011 is its consideration of security, specifically how this differs between men and women. It states that a transgender woman who has a gender recognition certificate may only be refused housing in the female estate on security grounds, and the requirement for such a refusal is that a cisgender woman with a similar history and offending record would also need to be housed in the male estate<sup>898</sup>. However, transgender men cannot be refused housing in the male estate on such grounds as “This is because there are no security grounds that can prevent location in the male estate.”<sup>899</sup>. It seems reasonable to interpret the term “security grounds” in this part of the document to mean “security grounds resulting from concerns that the person in question may endanger the safety of prisoners and staff in the new estate”, as the document later points out that a transgender man may have valid reasons to choose not to transfer to the male estate due to being concerned for their personal safety<sup>900</sup>. It is worth noting that this part of the policy refers only to security grounds preventing a transfer, not a person requesting not to be transferred due to their personal concerns for their safety. This disparity between how security is to be considered between men and women seems to say a lot not only about how the society that produced this document sees men and women in terms of relative risk, but also says a great deal about how this perception of the genders has resulted in a lopsided system, in which a dangerous woman must be treated as a man because society could not envision such a woman as existing and as such could not prepare for such an individual.

The rules contained within the 2011 PSI regarding the treatment of transgender prisoners were addressed in *R (Green) v Secretary of State for Justice*<sup>901</sup>. This case concerned a transgender woman who was housed in a men’s prison and denied access to various items, including tights and wigs due to security concerns<sup>902</sup>. The court found that the PSI had not been deviated from, and that the prison did have discretion to prohibit access to those items<sup>903</sup>. Furthermore the court also found that the denial of these items was not discriminatory<sup>904</sup>. The lack of a finding of discrimination in this case was because the court found that because the applicant did not have a gender recognition certificate that she was

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<sup>898</sup> National Offender Management Service instruction, The care and management of transexual prisoners, Ministry of Justice, PSI 07/2011, 4.3

<sup>899</sup> National Offender Management Service instruction, Ministry of Justice, The care and management of transexual prisoners PSI 07/2011, 4.4

<sup>900</sup> National Offender Management Service instruction, The care and management of transexual prisoners, Ministry of Justice, PSI 07/2011, 4.13

<sup>901</sup> *R (on the application of Green) v Secretary of State for Justice* [2013] EWHC 3491 (Admin)

<sup>902</sup> *R (on the application of Green) v Secretary of State for Justice* [2013] EWHC 3491 (Admin), paragraph 20

<sup>903</sup> *R (on the application of Green) v Secretary of State for Justice* [2013] EWHC 3491 (Admin), paragraph 50

<sup>904</sup> *R (on the application of Green) v Secretary of State for Justice* [2013] EWHC 3491 (Admin), paragraph 68

legally male, and that the correct comparator would be a cisgender man, who would also have been denied those items, rather than a cisgender woman who would have been treated differently<sup>905</sup>. This reasoning has been criticised on the grounds that it would have the effect of rendering claims of discrimination on the grounds of gender reassignment almost impossible, and cannot represent the intent of parliament when the Equality Act was passed<sup>906</sup>. This case can be contrasted with *(R (on the application of AB) v Secretary of State for Justice)*<sup>907</sup>, which concerned the human rights of a transgender woman housed in the male estate. In that case it was found to be a violation of her right to privacy, which was not the issue raised in *Green*, which concerns discrimination and access to items important to a persons transition, rather than the right to be housed in a specific part of the estate.

Following a number of high-profile cases of transgender women being housed in the male estate, and the suicides of three transgender women: Joanne Latham, Vikki Thompson and Jenny Swift<sup>908</sup>, a review into the treatment of transgender people in prisons was commissioned and was published in November 2016<sup>909</sup>. This review is notable as it stated that as not all transgender women place weight on legal or medical transition<sup>910</sup>, the relevant rules should adapt, and that the dealt presumption is that a person should be housed according to the gender they identify is, with all deviations from this requiring justification<sup>911</sup>. However it does state that evidence as to a person's gender identity would still be necessary for a person to be housed appropriately<sup>912</sup>. It also states that risk assessments should be free of

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<sup>905</sup> Ibid

<sup>906</sup> Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?, Sharpe, A, (2020), *The Modern Law Review*, 83: 539-557.

<sup>907</sup> *R (on the application of AB) v Secretary of State for Justice and another* [2009] EWHC 2220

<sup>908</sup> Transgender prison deaths: Watchdog calls for action, BBC news, 10th January 2017, located at [www.bbc.co.uk/news/uk-38562714](http://www.bbc.co.uk/news/uk-38562714)

<sup>909</sup> Review on the Care and Management of Transgender Offenders, Ministry of Justice, November 2016, located at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/566828/transgender-review-findings-web.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/566828/transgender-review-findings-web.PDF)

<sup>910</sup> Review on the Care and Management of Transgender Offenders, Ministry of Justice, November 2016, located at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/566828/transgender-review-findings-web.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/566828/transgender-review-findings-web.PDF) page 4 para 2

<sup>911</sup> Ibid

<sup>912</sup> Review on the Care and Management of Transgender Offenders, Ministry of Justice, November 2016, Located at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/566828/transgender-review-findings-web.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/566828/transgender-review-findings-web.PDF) page 5 para 3



stereotyping<sup>913</sup> and that isolation, including segregation, should be minimized<sup>914</sup>. The review also recommended that all relevant staff receive training on dealing with transgender people<sup>915</sup> and that more data should be collected on transgender people in prison, due to the lack of data up to that point<sup>916</sup>.

Following this review the rules for the treatment of transgender prisoners were revised, resulting in the creation of PSI 17/2016<sup>917</sup>. While this document can be said to show some progress from the 2011 PSI, it is uncertain how much of a change it actually represents. One change which may indicate an approach similar to self-identification is that transgender prisoners must now be asked what their view is on where they would like to be housed and what their gender is<sup>918</sup>. While asking a person to express their view as to their gender identity and where they should be housed may be seen as a shift to a more person centred approach, the rest of the policy seems to contradict this, particularly regarding the evidential requirements. It then states that those with legal gender recognition will be automatically housed in the gender recognised on their documentation unless there are security concerns. Those without legal gender recognition must produce evidence as to their gender and may only be transferred to the other estate following a decision by a transgender case board<sup>919</sup>. This procedure seems almost identical to the previous procedure in the 2011 document. However, while the previous policy required that a person would be likely to meet the criteria for a gender recognition certificate, the new policy is more generous as to what it considers as evidence<sup>920</sup>, however it is not clear how much evidence is required. Notably the chart used to present

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<sup>913</sup> Review on the Care and Management of Transgender Offenders, Ministry of Justice, November 2016, Located at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/566828/transgender-review-findings-web.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/566828/transgender-review-findings-web.PDF) page 6 para 5

<sup>914</sup> Review on the Care and Management of Transgender Offenders, Ministry of Justice, November 2016, Located at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/566828/transgender-review-findings-web.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/566828/transgender-review-findings-web.PDF) page 7 para 3

<sup>915</sup> Review on the Care and Management of Transgender Offenders, Ministry of Justice, November 2016, Located at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/566828/transgender-review-findings-web.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/566828/transgender-review-findings-web.PDF) page 7 para 7

<sup>916</sup> Review on the Care and Management of Transgender Offenders, November 2016, Ministry of Justice, Located at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/566828/transgender-review-findings-web.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/566828/transgender-review-findings-web.PDF) page 8 para 3

<sup>917</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 17/2016

<sup>918</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 17/2016 at 4.6

<sup>919</sup> Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, Ministry of Justice, PSI 17/2016 at 4.7 and 4.8

<sup>920</sup> Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, Ministry of Justice, PSI 17/2016 at Annex A

which types of evidence are permissible and their relative values indicates that the absence of “actual life” evidence will be considered counter evidence. Actual life evidence is defined as including a change of name, use of prosthetics, consistent use of gendered spaces and whether a person “presents as the gender identified with”. These criteria not only raise the question of “presenting as a gender” means, as it is not defined in the document, which may lead to the entrenchment of stereotypes as a means of “demonstrating” one’s gender and may also pose problems for those who have difficulty performing the actions often associated with this, such as those who may lack confidence or not have a home or work situation which enables them to do so. The forms of evidence accepted also mentions that the recommendation of medical professionals may be taken into account. It seems as though the evidence used to determine a person’s gender paints a picture of a recognition method that resembles a less formalised version of the model of gender recognition used in the case of passports, which while less formal than that used for GRC's still uses the input of medical professionals, possibly as they are seen more objective than the expressed view of the individual.

Another apparent advancement which may not be as progressive as it appears is that the policy now explicitly includes people with non-binary or fluid gender identities and intersex people<sup>921</sup>. However, the policy later states that they will always be housed according to their legal gender, unless they intend to “permanently transition to a different gender”<sup>922</sup>. This is somewhat problematic because, given that services are divided into male and female, this means that only binary genders can be recognised. There is no mention of how this interacts with the possibility that a person may have a legally recognised gender from another jurisdiction which is non-binary. It is also notable that a person who has a non-binary gender will, by default, be searched according to their legal gender unless a voluntary agreement has been made<sup>923</sup>. The document also, in its “sentence management: community only” section,

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<sup>921</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 17/2016 at 3.3

<sup>922</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 17/2016 at 6.7

<sup>923</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 17/2016 at 6.14

states that people with non-binary or fluid genders will be housed according to their legal gender apart from in exceptional circumstances<sup>924</sup>.

While emphasis may have shifted from solely considering a person's legal gender to also considering a person's self-identified gender, the system for managing transgender prisoners following the 2016 PSI, particularly non-binary prisoners still very much relied on a flawed system of gender recognition, to the extent that there is no way for a person, regardless of any of the relevant factors in their life, identity or circumstances, to guarantee that they will be housed anywhere other than the estate dictated by their legal gender, even before security concerns are taken into account. Despite this, it is worth mentioning that as shown previously in this chapter, passports do have lesser gender recognition criteria than the 2004 Act. This indicates that it is possible for less rigorous criteria to be used. It could be that the prison system is implementing less rigorous criteria by merely requiring "evidence", some of which can be lived rather than documentary in nature, but retains the references to legal gender to provide some certainty to those who have undergone the process, although this does not explain the reliance on legal gender for non-binary and gender fluid people. In that case the reliance on legal gender could simply be because recognising non-binary or fluid identities would be complex, so adhering to a legal mechanism which only acknowledges binary genders provides not only a reason to not recognise these identities, but also provides a structural framework to refer to that does not need to be otherwise justified, as it is assumed to already be justified by the fact that it was passed by Parliament.

Following the introduction of the 2016 PSI a number of articles were published in the press regarding transgender people, many of them negative<sup>925</sup>. Several of these articles concerned the case of Karen White, a transgender prisoner who had sexually assaulted another woman while housed in the female estate<sup>926</sup>. Following this reporting the government announced the opening of a new unit in HMP Downview, specifically for housing transgender inmates, who

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<sup>924</sup> National Offender Management Service instruction, The care and management of transexual prisoners, Ministry of Justice, PSI 17/2016 at 7.6

<sup>925</sup> Trans "extremists" and "rapists": How the media reported on trans people in 2018, Pink News, Ella Braidwood, December 31 2018, Located at <https://www.pinknews.co.uk/2018/12/31/trans-extremists-media-press-headlines/>, accessed 02/11/2019

<sup>926</sup> Karen White: how "manipulative" transgender inmate attacked again, The Guardian, Nazia Parveen, 11 Oct 2018, Located at <https://www.theguardian.com/society/2018/oct/11/karen-white-how-manipulative-and-controlling-offender-attacked-again-transgender-prison>, accessed 02/11/2019

have no contact with the general population of that prison<sup>927</sup>, although contradictory reports claim they do interact with other prisoners for some activities<sup>928</sup>. At the time of the most recent reports this unit houses 3 prisoners, all of whom are transgender women who have gender recognition certificates<sup>929</sup>. The case of Karen White has been cited as motivating the decision to open this unit<sup>930</sup>. The creation or operation of such a unit is not discussed in the 2016 PSI nor the subsequent Transgender Policy Framework.

Despite support for the 2016 PSI among professionals<sup>931</sup>, and possibly due to the increased negative portrayal of transgender prisoners by the media<sup>932</sup> it was replaced in 2019 by the Transgender Policy Framework<sup>933</sup>.

The Transgender Policy Framework makes a number of changes from the 2016 PSI. The power to transfer a prisoner to the other estate was removed from the transgender case boards<sup>934</sup>, with more specific requirements given as to their composition. The timeframe to convene a local transgender case board was also extended from 3 days to 14 days<sup>935</sup>, which now deals mostly with voluntary arrangements<sup>936</sup>. In order to be housed in the estate that does

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<sup>927</sup> First UK Transgender prison unit to open, BBC News, 3 March 2019, Located at <https://www.bbc.co.uk/news/uk-47434730> accessed 02/11/2019

<sup>928</sup> "High-risk" transgender inmates at Downview mix with women, The Times, Andrew Gilligan, March 17 2019, Located at <https://www.thetimes.co.uk/article/high-risk-transgender-inmates-at-downview-mix-with-women-zt33zb2ks> accessed 02/11/2019

<sup>929</sup> First UK Transgender prison unit to open, BBC News, 3 March 2019, Located at <https://www.bbc.co.uk/news/uk-47434730> accessed 02/11/2019

<sup>930</sup> Government considers the option of special transgender prisoner wings, Sunday Times, Andrew Gilligan, 10 February 2019

<sup>931</sup> Learning Lessons bulletin, Transgender prisoners, Prisons & probation Ombudsman, January 2017, Located at [https://s3-eu-west-2.amazonaws.com/ppo-dev-storage-4dvljl6iqfyh/uploads/2017/01/PPO-Learning-Lessons-Bulletin\\_Transgender-prisoners\\_Final\\_WEB\\_Jan-17.pdf](https://s3-eu-west-2.amazonaws.com/ppo-dev-storage-4dvljl6iqfyh/uploads/2017/01/PPO-Learning-Lessons-Bulletin_Transgender-prisoners_Final_WEB_Jan-17.pdf) accessed 01/11/2019

<sup>932</sup> Trans "extremists" and "rapists": How the media reported on trans people in 2018, Pink News, Ella Braidwood, December 31 2018, Located at <https://www.pinknews.co.uk/2018/12/31/trans-extremists-media-press-headlines/>, accessed 02/11/2019

<sup>933</sup> The care and management of individuals who are transgender, Ministry of Justice, HM Prisons and Probation Service, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019

<sup>934</sup> The care and management of individuals who are transgender, Ministry of Justice, HM Prisons and Probation Service, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at 4.14

<sup>935</sup> The care and management of individuals who are transgender, Ministry of Justice, HM Prisons and Probation Service, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at 1.15

The care and management of individuals who are transgender, Ministry of Justice, HM Prisons and Probation Service, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at 4.12

not correspond with the gender listed on their birth certificate, such a transfer must now be approved by a complex case board<sup>937</sup>, which was previously only used for prisoners who posed particular risk<sup>938</sup>. There is no required timeframe given for a complex case board to sit. Prisoners held on remand are now to be housed according to the gender listed on their birth certificate, unless permitted to be housed in the other estate by a complex case board<sup>939</sup>. This represents a significant change from the 2016 PSI which previously allowed for discretion to be used if it was in the best interests of safety and well-being and for a person to be re housed following a transgender case board after 3 days<sup>940</sup>. The Policy Framework also specifies a more explicit list of factors to be considered when deciding where a trans person should be housed. A number of the items may be considered unusual such as the use of transition related medication being considered a risk posed by the individual to others, as well as the consideration of allegations of behaviour that have not been proven but have been found “credible”<sup>941</sup>. The Policy Framework also allows for consideration of “anatomy” as a factor when considering the dangers that the transgender prisoner may pose to others<sup>942</sup>. This seems to embed the idea that transgender bodies, particularly those of transgender women may be inherently more dangerous than those of cisgender people. This is particularly interesting when contrasted with the transgender prisoners policy in place in Scotland, as will be discussed later in this chapter.

In addition to these substantive changes there are a number of changes in the material covered in the document. For example it omits the language from the 2016 PSI stating that “Women offenders who present a high risk of harm to other women are managed safely in the female estate. Transgender women who pose similar risks should be managed in a similar

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<sup>937</sup> The care and management of individuals who are transgender, Ministry of Justice, HM Prisons and Probation Service, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at 4.6

<sup>938</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 17/2016 at 5.19

<sup>939</sup> The care and management of individuals who are transgender, Ministry of Justice, HM Prisons and Probation Service, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at 1.5

<sup>940</sup> National Offender Management Service instruction, The care and management of transsexual prisoners, Ministry of Justice, PSI 17/2016 at 5.10

<sup>941</sup> The care and management of individuals who are transgender, Ministry of Justice, HM Prisons and Probation Service, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at 4.18

<sup>942</sup> The care and management of individuals who are transgender, Ministry of Justice, HM Prisons and Probation Service, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at 4.18

way in the female estate”<sup>943</sup>. Instead the policy framework repeatedly emphasises the need to consider possible dangerousness of the transgender person, with the closest language to that in the 2016 PSI quoted above being:

“When considering whether to hold a transgender woman with a GRC with other women, or in separate accommodation, all risks need to be taken into account. Any significant risks posed by a transgender woman with a GRC to other women, or by other prisoners to the individual, should be assessed in order to make sure that appropriate accommodation, regime and supervision is provided to manage such risks appropriately.

4.66 If risk is particularly high, it may not be appropriate to hold a transgender woman with a GRC in the women’s estate, either with the general population, or on a bespoke unit.

1. It may then be necessary to locate a transgender (male to female) woman with a GRC in the men’s estate. This can only happen if the risk concerns surrounding the transgender individual are at the equivalent level to those that would apply to any other women that may need to be held in the male estate.
2. If a transgender woman with a GRC must be placed in the male estate, she must be treated as a female prisoner in the men’s estate. She must be held separately and according to a women’s regime as set out in the Women’s Policy Framework. This provision exists as the men’s estate has greater capacity to manage individuals in custody who pose an exceptionally high risk of harm to others.”<sup>944</sup>

This change seems to be more than merely a matter of emphasis, and represents a change in evaluation of the capacity of the gendered estates to deal with dangerous inmates. At the time of writing reference to housing women in the men's estate could not be found in the Women's Policy Framework, with the only reference to transgender prisoners being to refer to the 2016

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<sup>943</sup> The care and management of individuals who are transgender, Ministry of Justice, HM Prisons and Probation Service, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at 6.2

<sup>944</sup> The care and management of individuals who are transgender, Ministry of Justice, HM Prisons and Probation Service, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at 4.65-4.68

PSI<sup>945</sup>. It is not clear what data was used in reaching this conclusion that it was no longer correct to state that the women's estate is equipped to deal with dangerous women prisoners.

The Transgender Policy Framework continues to refer to “legal gender”, and states that this can be determined by examining a person’s birth certificate<sup>946</sup>. It is unclear if this reflects an understanding of legal gender in which a person’s legal gender is singular for all purposes and the birth certificate is authoritative in all circumstances. The alternative may be that after every mention of “legal gender” in the document, there is an unspoken “for the purposes of imprisonment”, which may be reasonable to imply. However, there is no particular evidence for this reading. It is worth noting that treating birth certificates as authoritative may simply be a product of legislation. Because prison staff need to be able to determine if a person has a GRC, however asking for a GRC is not regarded as good practice<sup>947</sup>, they must use some other way of discovering this. It is true that in the case of persons with a GRC their birth certificate can be regarded as authoritative of their legal gender for all purposes due to the language in the Gender Recognition Act<sup>948</sup>. However it seems that, for reasons discussed previously in this chapter, practice and the relevant case law indicate that until a person receives a GRC they do not have a single unified legal gender that may be determined by looking at their birth certificate. It is thus unclear if the prison service has some other understanding of the functioning of the law in this area, or if they choose to use the birth certificate as a metric for everyone, not because they are legally compelled, but out of convenience, as they are able to do if one regards imprisonment as being within the “relevant but not essential” category of legal situations. Indeed, it would seem strange to claim that imprisonment would fall into the “essential” category, as even the current policy allows a person to be housed contrary to their sex assigned at birth in some situations. As such it seems that either the prison service is operating on the understanding that legal gender is singular and emanates from birth certificates, or that a person can have multiple legal

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<sup>945</sup> Women's Policy Framework, HM Prison & Probation Service, Ministry of Justice, Published 21 December 2018, Located at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/767304/women\\_s-policy-framework.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767304/women_s-policy-framework.pdf), accessed 05/11/2019

<sup>946</sup> The care and management of individuals who are transgender, Ministry of Justice, HM Prisons and Probation Service, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at 2.8

<sup>947</sup> The care and management of individuals who are transgender, Ministry of Justice, HM Prisons and Probation Service, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at Annex B

<sup>948</sup> Gender Recognition Act 2004, Section 9

genders, but the GRC criteria are being used in this situation voluntarily, but this could change in the future. It is not clear which of these possibilities is the case.

It is also worth noting the consequences of the changes in the Transgender Policy Framework on those held on remand or on short sentences. This is due to local transgender case boards being convened in 14 days rather than 3 days and the fact that transfers to the other estate are now dealt with by complex case boards, which have no requirement as to how quickly they are convened. When combined with the removal of discretion as to the housing of those held on remand this may result on certain prisoners being unable to be housed according to their gender identity, not due to their particular circumstances or doubts as to their authenticity, but simply due to the procedures put in place.

In various parts of the UK law making powers regarding certain issues are devolved to regional governments. While the focus of this chapter is on the law in England and Wales, it is worth noting that prisons are a devolved issue in Scotland. The Scottish prison service has its own rules regarding transgender prisoners<sup>949</sup> which can be contrasted with the Transgender Policy Framework. While it will not be addressed in depth, the contrasting approaches are worth commenting on. The Scottish policy places significantly more emphasis on social gender rather than the “legal gender” first approach present in all of the English policies. It emphasises that the social gender in which a person lives should form the basis of their treatment, whether they have a GRC or not<sup>950</sup>. It emphasises that social gender should form the basis for how a person is searched<sup>951</sup> and that initial as well as subsequent housing decisions should also be based on the social gender in which a person actually lives<sup>952</sup>. While

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<sup>949</sup> Scottish Prison Service Gender Identity and Gender Reassignment Policy, March 2014, Located at [http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562\\_1392.pdf](http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562_1392.pdf), accessed 05/11/2019

<sup>950</sup> Scottish Prison Service Gender Identity and Gender Reassignment Policy, March 2014, Located at [http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562\\_1392.pdf](http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562_1392.pdf), accessed 05/11/2019, at 3.3

<sup>951</sup> Scottish Prison Service Gender Identity and Gender Reassignment Policy, March 2014, Located at [http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562\\_1392.pdf](http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562_1392.pdf), accessed 05/11/2019, at 3.7

<sup>952</sup> Scottish Prison Service Gender Identity and Gender Reassignment Policy, March 2014, Located at [http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562\\_1392.pdf](http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562_1392.pdf), accessed 05/11/2019, at 4.1



it does state that the risks the transgender prisoner may pose must be considered<sup>953</sup>, it also states that:

“A male-to-female person in custody living permanently as a woman without genital surgery should be allocated to a female establishment. She should not be automatically regarded as posing a high sexual offence risk to other people in custody and should not be subject to any automatic restrictions of her association with other people in custody. However, if there is clear evidence that she, as an individual, may pose a sexual offence risk, then this should be dealt with as for any other person in custody posing a risk.”<sup>954</sup>

This places emphasis on social gender, and on treating transgender people as any other person of their gender rather than someone who’s gender expression must be weighed against possible dangers they may pose. This is a stark contrast when compared to the approach in England, particularly given that the current Policy Framework allows for “anatomy” to be considered a possibly dangerous characteristic of a transgender person<sup>955</sup>. It is worth noting that the Scottish policy was implemented in 2014, before the 2016 PSIs and the highly publicised suicides that prompted it. It was also created in conjunction with transgender community groups and provides contact details for these groups in the “further information” section of the document<sup>956</sup>. In contrast there is no evidence of such collaboration with the transgender community regarding the English Transgender Policy Framework.

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<sup>953</sup> Scottish Prison Service Gender Identity and Gender Reassignment Policy, March 2014, Located at [http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562\\_1392.pdf](http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562_1392.pdf), accessed 05/11/2019, at 6.3

<sup>954</sup> Scottish Prison Service Gender Identity and Gender Reassignment Policy, March 2014, Located at [http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562\\_1392.pdf](http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562_1392.pdf), accessed 05/11/2019, at 6.4

<sup>955</sup> The care and management of individuals who are transgender, Ministry of Justice, HM Prisons and Probation Service, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at 4.18

<sup>956</sup> Scottish Prison Service Gender Identity and Gender Reassignment Policy, March 2014, Located at [http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562\\_1392.pdf](http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562_1392.pdf), accessed 05/11/2019, at Appendix C

While intersex people and those with non-binary gender identities are mentioned in the Scottish policy, there are no specific measures regarding their treatment<sup>957</sup>. Presumably the “social gender” approach taken to prisoners in general could be applied to intersex people with minimal issues. However it is less clear how such an approach would apply to a person with a non-binary social gender. However, the policy does refer to the “predominant gender”<sup>958</sup> in which a person is living, so it is possible that a non-binary person may be assigned a binary “social gender” on the basis of “predominance” or perceived predominance.

Prisons also interact with gender recognition systems in other ways, in addition to gender recognition impacting where a person may be housed. For example in the case of Jay<sup>959</sup> a transgender woman spent a portion of her life in and out of prison. During this period she applied for a gender recognition certificate three times, and was denied each time due to providing insufficient evidence<sup>960</sup>. The court found that the gender recognition panel had considered irrelevant factors and made the decisions to deny her a GRC on a flawed basis, so allowed the appeal<sup>961</sup>. Jay also alleged that her article 8 right to privacy and article 14 right to non-discrimination had been violated on the grounds that the process had been invasive, restricted her ability to live her life and had been unequally applied in her case due to her status as a prisoner<sup>962</sup>. While the court did not issue a judgement on that issue<sup>963</sup>, the difficulties experienced by Jay are still worth considering as an example of the difficulties that can be faced disproportionately by those seeking gender recognition while in prison.

Jay claimed that she had particular trouble in complying with the evidential requirements due to her status as a prisoner, and she demonstrated this to the gender recognition panel, which inflexibly insisted on compliance with the requirements. As a result of this Jay claimed she had been discriminated against by being denied gender recognition, which is an article 8

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<sup>957</sup> Scottish Prison Service Gender Identity and Gender Reassignment Policy, March 2014, Located at [http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562\\_1392.pdf](http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562_1392.pdf), accessed 05/11/2019, at 1.4

<sup>958</sup> Scottish Prison Service Gender Identity and Gender Reassignment Policy, March 2014, Located at [http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562\\_1392.pdf](http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562_1392.pdf), accessed 05/11/2019, at 6.4

<sup>959</sup> Jay [2018] EWHC 2620 (Fam)

<sup>960</sup> Jay [2018] EWHC 2620 (Fam) para 20-52

<sup>961</sup> Jay [2018] EWHC 2620 (Fam) para 97

<sup>962</sup> Jay [2018] EWHC 2620 (Fam) para 71

<sup>963</sup> Jay [2018] EWHC 2620 (Fam) para 97

right, on the grounds of her status as a prisoner<sup>964</sup>. This was because unable to obtain the necessary medical evidence, due to the prison doctors not being qualified in transgender health and having been denied permission to see an outside specialist<sup>965</sup>. This should serve as a reminder of how prison rules can thwart gender recognition systems and result in persons being denied their right to legal gender recognition, and that the probability of this occurring increases with the burden imposed by evidential requirements.

### Possible reforms

Any discussion of gender recognition in the UK must take into account the recent review conducted by the Women and Equalities Committee and the related calls for reform<sup>966</sup>. The review focused on four areas, the Gender Recognition Act 2004, the Equality Act 2010, NHS services, and anti-trans prejudice.

With regards to gender recognition the committee concluded that the Gender Recognition Act should be reviewed, as while it was ahead of its time when introduced, a number of its features including its medicalised approach are now recognised as flawed<sup>967</sup>. The committee also recommended reducing the age requirement for a gender recognition certificate to 16, but were reluctant to recommend reducing it below that age<sup>968</sup>. The review was also critical of the inappropriate use of gender recognition certificates by a number of bodies and noted that no prosecutions have been brought under section 22 of the Gender Recognition Act

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<sup>964</sup> Jay [2018] EWHC 2620 (Fam) para 77

<sup>965</sup> Jay [2018] EWHC 2620 (Fam) para 25

<sup>966</sup> Transgender Equality, Women and Equalities Committee, First Report of Session 2015-16, HC 390, Printed 8 December 2015, House of Commons, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>

<sup>967</sup> Transgender Equality, Women and Equalities Committee, First Report of Session 2015-16, HC 390, Printed 8 December 2015, House of Commons, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, at 44 and 45

<sup>968</sup> Transgender Equality, Women and Equalities Committee, First Report of Session 2015-16, HC 390, Printed 8 December 2015, House of Commons, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, at 70-71

which prohibits the disclosure of a person's gender history or gender recognition process, despite evidence that breaches of this section have occurred<sup>969</sup>.

The report also recommended that the protected characteristic of gender reassignment be amended to be gender identity<sup>970</sup> and that the measures relating to single sex services be amended so as to not apply to those who have received a gender recognition certificate, although they did not extend this recommendation to those who have not received a recognition certificate but would meet the same criteria<sup>971</sup>. The committee acknowledges that turning away a person with a GRC from such a service would be unreasonable, but this requirement for a GRC may serve to exclude those without one from those services. It cannot be that the mere acquisition of paperwork is what makes it unreasonable to turn someone away from such a service. It must be that a person can possess qualities other than having the correct paperwork which would make turning them away unreasonable. It may be that in making a recommendation based on paperwork, rather than characteristics the committee has done a disservice to those who cannot easily interface with the gender recognition system.

This report is also notable for recommending that the UK introduce a third "x" category to the gender field on its passports. In a particularly strong statement the report stated:

"If Australia is able to implement such a policy there is no reason why the UK cannot do the same."<sup>972</sup>

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<sup>969</sup> Transgender Equality, Women and Equalities Committee, First Report of Session 2015-16, HC 390, Printed 8 December 2015, House of Commons, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, at 87

<sup>970</sup> Transgender Equality, Women and Equalities Committee, First Report of Session 2015-16, HC 390, Printed 8 December 2015, House of Commons, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, at 108

<sup>971</sup> Transgender Equality, Women and Equalities Committee, First Report of Session 2015-16, HC 390, Printed 8 December 2015, House of Commons, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, at 132

<sup>972</sup> Transgender Equality, Women and Equalities Committee, First Report of Session 2015-16, HC 390, Printed 8 December 2015, House of Commons, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, at 289

While little space is devoted to passports in the report, it seems from context as though the committee intends for such a field to recognise non-binary gender identities<sup>973</sup>.

The report also mentions prisons at some length, and welcomed the review of the 2011 PSI. However as the report was written before the creation of PSI 17/2016 the discussion here of this section of the report will be limited. Some sections, however, may have value regardless of the current PSI, for example, the report notes that many of the issues faced by trans people in prisons are a reflection of general ignorance and societal views of trans people, which affects the implementation of the prison service instructions despite not being a product of them<sup>974</sup>. The report also mentioned that ambiguity in a prison service instruction is counter-productive<sup>975</sup>, and that media coverage on this issue has been unhelpful<sup>976</sup>. The report also pointed out a key difficulty that can be faced no matter what the content of the current PSI is, that of non-implementation<sup>977</sup>. This can serve as an important reminder that any legal measures can be rendered irrelevant if those expected to implement them are not adequately trained and held accountable for its implementation. Another example of this issue can be found in the committee's remarks on the situation regarding transgender participation in sports. While the Equality Act did include some measures which may prevent transgender people from participating, the committee found that a far bigger issue was public misunderstanding of the statute resulting in people being unnecessarily and possibly unlawfully being barred from participating in sports<sup>978</sup>.

Following this review Jeremy Corbyn, former leader of the Labour party at the time of writing, announced his support for a gender recognition system which would allow a person

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<sup>973</sup> Transgender Equality, Women and Equalities Committee, First Report of Session 2015-16, HC 390, Printed 8 December 2015, House of Commons, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, at 285

<sup>974</sup> Transgender Equality, Women and Equalities Committee, First Report of Session 2015-16, HC 390, Printed 8 December 2015, House of Commons, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, at 285

Transgender Equality, Women and Equalities Committee, First Report of Session 2015-16, HC 390, Printed 8 December 2015, House of Commons, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, at 308

<sup>976</sup> Transgender Equality, Women and Equalities Committee, First Report of Session 2015-16, HC 390, Printed 8 December 2015, House of Commons, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, at 310

Transgender Equality, Women and Equalities Committee, First Report of Session 2015-16, HC 390, Printed 8 December 2015, House of Commons, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, at 309

<sup>978</sup> Transgender Equality, Women and Equalities Committee, First Report of Session 2015-16, HC 390, Printed 8 December 2015, House of Commons, Located at <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, at 143

to self-identify their gender<sup>979</sup>. It is not clear if this would result in the abandonment of the gender recognition panels in favour of a system similar to that used in Malta, which simply requires a signed declaration<sup>980</sup>, or if it would include legal recognition for non-binary gender identities. In response to this the government announced a review of the Act to be concluded in Autumn 2017<sup>981</sup>. In July 2018 the government launched a consultation into possible reforms of the Gender Recognition Act<sup>982</sup>. The consultation was initially scheduled to end on the 19<sup>th</sup> of October 2019, but was extended until the 22 October following reports of users being unable to submit responses due to website slowdowns and crashes close to the deadline due to the volume of users attempting to submit responses at the same time. During the consultation period the government felt the need to issue a response to misleading reporting in order to remind the public that the consultation was not pushing for any specific reforms at this stage and that changes to the Gender Recognition Act would have no impact on the allowances for single sex services contained in the Equality Act<sup>983</sup>. When the writing of this chapter began the web page for the consultation stated that the government was currently analysing the feedback from the consultation<sup>984</sup>. On 5 October 2019 a government minister was reported as saying that plans to reform the GRA had been "kicked into the long grass"<sup>985</sup>. During the period of delay in responding to the consultation a number of LGBT advocacy groups wrote a joint letter stating that trans people will be harmed by such delays due to being exposed to unnecessary and invasive medical requirements<sup>986</sup>. Following this period of delay the government released an official ministerial response to the consultation on 22

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<sup>979</sup> Jeremy Corbyn wants trans rights overhaul - and will support the conservatives to make it happen, Mayer Nissim, Pink News, 19th July 2017, located at [www.pinknews.co.uk/2017/07/19/jeremy-corbyn-wants-trans-rights-overhaul-and-will-support-the-conservatives-to-make-it-happen/](http://www.pinknews.co.uk/2017/07/19/jeremy-corbyn-wants-trans-rights-overhaul-and-will-support-the-conservatives-to-make-it-happen/), accessed 17/01/2021

<sup>980</sup> Malta: Gender Identity, Gender Expression and Sex Characteristics Act [Malta], CAP. 540., 14 April 2015, Section 4(3)

<sup>981</sup> Changing gender set to become easier as "demeaning" medical checks are reviewed, Ben Riley-Smith, The Telegraph, July 22<sup>nd</sup> 2017 Located at [www.telegraph.co.uk/news/2017/07/22/changing-gender-set-become-easier-demeaning-medical-checks-reviewed/](http://www.telegraph.co.uk/news/2017/07/22/changing-gender-set-become-easier-demeaning-medical-checks-reviewed/), accessed 17/01/2021, paragraph 15

<sup>982</sup> Reform of the Gender Recognition Act 2004, Government Equalities office, Gov.uk, Located at <https://www.gov.uk/government/consultations/reform-of-the-gender-recognition-act-2004>, accessed 06/11/2019

<sup>983</sup> Government response, Facts about the Gender Recognition Act consultation, Government Equalities Office, Gov.uk, Published 14th October 2018, Located at <https://www.gov.uk/government/news/facts-about-the-gender-recognition-act-consultation>, accessed 07/11/2019

<sup>984</sup> Reform of the Gender Recognition Act 2004, Government Equalities office, Gov.uk, Located at <https://www.gov.uk/government/consultations/reform-of-the-gender-recognition-act-2004>, accessed 06/11/2019

<sup>985</sup> 'Pick your own sex' plans are shelved: Equalities minister Liz Truss abandons drive to relax laws around changing gender, Daily Mail, Glen Owen, 5th October 2019, Located at <https://www.dailymail.co.uk/news/article-7542003/Equalities-minister-Liz-Truss-abandons-drive-relax-laws-changing-gender.html>, accessed 13/12/2019

<sup>986</sup> Sexual health of trans people at risk due to self-ID delay, charities warn, Lily Wakefeild, Pink news, 12 July 2019, Located at <https://www.pinknews.co.uk/2019/07/12/sexual-health-trans-people-risk-self-id-delay-charities-warn/>, accessed 06/11/2019

September 2020<sup>987</sup>, as well as an analysis of the responses<sup>988</sup>. This response did not demonstrate any intent to reform the substance of the Gender Recognition Act, instead proposing that the gender recognition certificate process be moved online and that the application fee be reduced<sup>989</sup>.

### Concluding remarks:

Overall UK law on this issue is characterised by a tension between two different rationales for gender recognition. The first is the right to be recognised and treated by the law according to one's gender. This is the core issue in the cases in the *Corbett* and *Tan* cases, although the results of these cases may have been far from satisfactory from this perspective. This can be contrasted with the other rationale for gender recognition, namely the right to blend in, as embodied by the human rights cases concluding in *Goodwin v UK*. It is worth noting that these two rationales are not totally separate. As the right to be recognised as one's gender identity can include the right to be recognised for all purposes, as provided for by the Gender Recognition Act, which allows one to blend in in this fashion. This may be why the differences between these two lines of thinking are often conflated, as both their aims are accomplished, to varying degrees, by similar legal measures. However, there are some situations in which the differences become more, apparent, particularly in the cases of those with non-binary gender identities.

The desire to be recognised, as well as the desire to be indistinguishable as a trans person and “blend in” can be satisfied in part by the Gender Recognition Act. The desire to be recognised is satisfied by the fact that it allows a person to change their legal gender in a way that must be recognised by all for all purposes. This avoids many of the issues with having to

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<sup>987</sup> Written statement to Parliament, Written Ministerial Statement: Response to Gender Recognition Act 2004 consultation, Government Equalities Office, Located at <https://www.gov.uk/government/speeches/response-to-gender-recognition-act-2004-consultation>, accessed 10/11/2020

<sup>988</sup> Gender Recognition Act Analysis of consultation responses, Government Equalities Office, Located at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/919890/Analysis\\_of\\_responses\\_Gender\\_Recognition\\_Act.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919890/Analysis_of_responses_Gender_Recognition_Act.pdf), accessed 10/11/2020

Written statement to Parliament, Written Ministerial Statement: Response to Gender Recognition Act 2004 consultation, Government Equalities Office, Located at <https://www.gov.uk/government/speeches/response-to-gender-recognition-act-2004-consultation>, accessed 10/11/2020

negotiate gender recognition separately for many purposes, particularly if social values make this difficult. This is useful from this perspective mainly because it sets a social minimum and leaves very few situations in which it is outright impossible to have one's gender recognised. However, the Act may be seen as somewhat wanting from this perspective, as it only permits recognition of those with binary genders, and places a number of restrictions on recognition, including the need for a diagnosis of gender dysphoria.

When considering the desire to have one's gender recognised but to be unrecognisable as a transgender person some of these features of the act may become desirable. Particularly the lack of recognition for non-binary genders would not be important to a person who prioritises being indistinguishable from a cisgender person, as being recognised as non-binary would give one a legal status that no cisgender person could have, as assigning non-binary genders at birth is not common practice. From this perspective the most important features of the Act are those that provide for changing one's birth certificate and for criminal sanction for a person who discloses that a person has a GRC if they came into this knowledge in an official capacity.

It may be possible for a reformed Gender Recognition Act that uses a self-declaration model, as seen in Malta, to satisfy both drives for recognition. However this may be harder in the cases of non-binary people and intersex people. As mentioned above, it is difficult for recognition of a non-binary person to allow them to no longer be recognisable as transgender. However, if one merely seeks recognition rather than the ability to "become invisible", recognition of non-binary genders becomes much easier, especially if one considers that it is, on some levels, already occurring in those legal relationships where gender is relevant but not essential. This is evident as non-binary titles become recognised by various institutions, including banks and institutions of higher education.

This tension is also seen in intersex activism. While some Intersex people, such as Norrie in Australia seek to have their intersex identity officially recognised as distinct from male or female<sup>990</sup>, many prominent intersex organisations do not promote "third sex" legal status for

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<sup>990</sup> See page 69



intersex people, and actively oppose labelling an intersex infant as such, but support self-identification in general so long as gender / sex differentiation remains legally necessary.<sup>991</sup>

The other major tension in the UK concerns how the concept of legal gender works or should work rather than the objectives gender recognition measures should meet. This is the tension between the model discussed in *Corbett*, in which a person, for purposes where law is relevant but not essential, may have different genders recognised according to different criteria for each purpose and the model in which a person has a single unified legal gender, defined by their birth certificate until such a time as they receive a GRC. For purposes of convenience these shall be referred to as the *Corbett* model and the unitary model. As discussed previously in this chapter the *Corbett* model appears most likely to be an accurate representation of the law on this matter in the UK for a number of factors including how gender recognition is done for the purpose of passports and everyday matters such as banking as well as Lady Hale's opinion in *Chief Constable of West Yorkshire*. However the unitary model does have some evidence supporting it including *R v Tan* and Lord Bingham's opinion in *A v Chief Constable of West Yorkshire* as well as references to "legal gender" in the prison service instructions and transgender policy framework, which seem to imply that this is understood to derive sole from a person's birth certificate rather than being flexible depending on the purpose. This tension manifests in instruments such as the Transgender Policy Framework, which seem to understand legal gender as unitary, which, if this model is not an accurate reflection of the law, unessential fetters the discretion of the government to use different criteria to recognise a person's gender that may avoid the injustices inherent in relying on birth certificates.

The UK is also notable in how some pieces of legislation resist any trend that may be present towards "de-gendering" legal systems. For example whereas in many jurisdictions such as Australia<sup>992</sup> and New Zealand<sup>993</sup> have introduced same-sex marriage by simply rendering gender a non-factor, it remains very much an issue in the UK. This is because of the aspects of the GRA that reference marriage, including the spousal veto discussed previously<sup>994</sup>, as

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<sup>991</sup> See for example The Darlington Statement, 10/3/2017, Located at <https://darlington.org.au/statement/>, accessed 14/12/2020

<sup>992</sup> Marriage Amendment (Definition and Religious Freedoms) Act 2017

<sup>993</sup> Marriage (Definition of Marriage) Amendment Act 2013, Public Act 2013 No 20

<sup>994</sup> Discussed at page 153

well as certain measures such as the fact that only heterosexual relations are considered to be adultery for the purposes of divorce<sup>995</sup>. Civil partnerships were also only available to homosexual couples<sup>996</sup>, however this has been amended by the Civil Partnership (Opposite-sex Couples) Regulations 2019<sup>997</sup> issued as per the Civil Partnerships, Marriages and Deaths (Registration) Act 2019<sup>998</sup>. This difference in approach means that despite achieving marriage equality for the most part, the way this was achieved means that one's gender / sex remains more of a factor than in other jurisdictions. However this may soon change, in addition to the recent de-gendering of civil partnerships the women and equalities committee is also currently engaged in a consultation on proposed reforms to gender recognition in the UK, including the removal of the fee for a gender recognition certificate and making the process available online. Among the issues being examined in the consultation are the possibility of reform to gender recognition with regards to marriage, in particular the use of interim gender recognition certificates and the spousal veto.

De-gendering may also ease a number of the tensions that characterise UK law should this approach be pursued, while de-gendering policies will be discussed in more detail in the final chapter, it is worth briefly mentioning. For example pursuing recognition of one's expressed identity may be easier if there are fewer practical implications, so such recognition would be trivially easy. Similarly, those wanting recognition in order to avoid discrimination may find it much easier if gender interacts with fewer aspects of their lives, thus offering fewer relevant purposes which may contradict and thus reveal their trans status. As others have discussed, any future reductions in the relevance of gender will necessarily interact with whatever gender recognition system is in place at the time, and serious thought will need to be given to whether specific purposes actually require any interaction with gender at all<sup>999</sup>.

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<sup>995</sup> The Matrimonial Causes Act 1973 Section 1 (6)

<sup>996</sup> Civil Partnership Act 2004, S3 (1) (a)

<sup>997</sup> The Civil Partnership (Opposite-sex Couples) Regulations 2019 2019 No. 1458, Regulation 3

<sup>998</sup> Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019, S2 (1)

<sup>999</sup> (De)regulating Transgender identities, Flora Renz, featured in Research handbook on gender, sexuality and the law, Ashford, C., Maine, A.(eds), Edward Elgar Publishing,(2020), Page 153

## Analysis

As the details of specific jurisdictions have been addressed in the previous chapter, this chapter will use these jurisdictions to compare how legal gender and sex recognition within them works and the strengths and weaknesses of the various characteristics of each system. Due to the complexity of the task, the aspects of the laws being examined will be addressed in a number of stages examining different aspects of the law. Each section will include a

critical look at the relevant aspect of the law in the four jurisdictions and examine why this is the case and the advantages and disadvantages of the status quo. As summarising each aspect of each jurisdiction would render a large section of the material repetitive, each topic will be addressed with individual jurisdictions being discussed to illustrate various issues or to provide examples.

### How is recognition done?

In terms of how recognition is done there are two key aspects worthy of attention which, while notionally separate do impact each other, these being: To what extent do the jurisdictions examined recognise sex and gender as being separated? Secondly, do these jurisdictions recognize a single legal gender or recognise different gender identities for different purposes? This section examines how recognition is done with regards to how it is conceptualized by the jurisdictions, how recognition is done practically will be addressed in the “how is recognition accessed” section.

### Separation / entanglement of sex and gender:

In general the jurisdictions examined do not recognise sex and gender as being separate<sup>1000</sup>. This is, in large part due to the legacy of colonialism resulting in the gender recognition systems in each of the jurisdictions resembling, at least until recent years, that of the UK. The UK has, in terms of its legal system, had an interesting relationship with this concept. The idea that sex and gender were separate was mentioned in *Corbett v Corbett*<sup>1001</sup>, as the result of that case was justified based on the “essential nature of marriage” being related to physical

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<sup>1000</sup> See the chapters corresponding to each jurisdiction for details.

<sup>1001</sup> *Corbett v Corbett* (Otherwise Ashley) [1971] P. 8, at 106

characteristics and thus rooted in sex<sup>1002</sup>. However it may be pointed out that marriage is an essentially social relationship, and physical characteristics are not, in fact at the core of marriage as a legal concept<sup>1003</sup>, as can be justified by the introduction of marriage equality<sup>1004</sup>. Additionally *Corbett v Corbett* itself mentions some of the complexities of this separation, as some of the experts in that case raised the idea that a transgender person may be a type of intersex person<sup>1005</sup>, an idea which was mentioned in a later law review report<sup>1006</sup>. While it may seem at odds with how sex and gender are normally explained, it is worth noting that the relationship between sex and gender can be complex. Anne Fausto Sterling refers to “sex/gender” in acknowledgement of how gender and sex have a complex and entangled relationship with gender<sup>1007</sup>, while other writers have pointed out that gender as an identity and phenomena constructed by interaction with others is always related in some ways to one’s body. This is not necessarily a direct connection, one’s sex does not always match their gender identity or gender expression, however how one experiences one’s gender will depend on one’s relationship to their own body, and other peoples interactions with, and perceptions of, one’s body. For this reason gender has been referred to as an “embodied process of becoming”<sup>1008</sup>, as one’s experience of one’s gender is constantly developing in relation to society and self-perception. This complex relationship between the body and gender may perhaps be one of the reasons why the law has been reluctant to separate the two.

There are of course other possible explanations to why this is the case. It may be that the law on this topic originates at a time when social and scientific understanding of sex and gender was in a lesser state that it is currently, and that the law has simply been slow to adjust to modern science and our evolving social understanding of gender. For example, as will be discussed on more detail shortly, the Australian government has adopted a unified set of

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<sup>1002</sup> *Corbett v Corbett* (Otherwise Ashley) [1971] P. 8, at 106

<sup>1003</sup> Individuals may have differing views on marriage as a religious relationship / institution, however analysis of this is beyond the scope of this document.

<sup>1004</sup> Marriage (same sex couples) Act 2013

<sup>1005</sup> *Corbett v Corbett* (Otherwise Ashley) [1971] P. 8, at 97

<sup>1006</sup> Report of the Interdepartmental Working Group on Transsexual People, April 2000, Located at [http://webcache.googleusercontent.com/search?q=cache:\\_wwlG1k\\_tFAJ:www.oocities.org/transforum2000/Resources/wgtrans.pdf+&cd=1&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:_wwlG1k_tFAJ:www.oocities.org/transforum2000/Resources/wgtrans.pdf+&cd=1&hl=en&ct=clnk&gl=uk) accessed 10/01/2020

<sup>1007</sup> Sex/gender: Biology in a social world, (Routledge series integrating science and culture, Anne Fausto-Sterling, 2012.

<sup>1008</sup> Clinical intervention and embodied subjectivity: atypically sexed Children and their Parents, Katrina Roen, published as a part of Critical Intersex, Edited by Morgan Holmes, Ashgate publishing, 2009, page 22 paragraph 2

guidelines on gender and sex recognition<sup>1009</sup> which recognise sex and gender as being separate<sup>1010</sup>. This may be an indication that the law in other jurisdictions may simply be lagging behind, which may explain by the model of sex and marriage used in *Corbett* has not been used in other jurisdictions<sup>1011</sup>.

However it is also possible that the reason for the legal conflation of sex and gender serves a functional purpose. During the discussion of the Equality Act 2010, it was discussed how the words sex and gender being conflated serves to protect the rights of transgender people<sup>1012</sup>. This is because during that discussion it was mentioned that changing rooms may be regarded as sex segregated facilities, rather than gender segregated<sup>1013</sup>. If this were the case it could be stated that because a transgender person may have transitioned in terms of gender, they cannot change their biological sex, using similar reasoning to *Corbett*, but applied far more broadly. This argument may not reflect our understanding of sex, given that it is determined based on a number of factors<sup>1014</sup>, and has a complex connection with gender and phenotype and genotype, as well as karyotype<sup>1015</sup>. Regardless of whether this argument has any basis in science, one can see how a disentanglement of gender and sex may be used to deny a transgender person access to gendered facilities, by simply re-designating gender segregated facilities as sex segregated facilities. As such during the discussion of this issue in parliament it was pointed out that doing so would essentially amount to playing semantic games to bar trans people from such facilities<sup>1016</sup>. However it may be possible to recognise sex and gender as being distinct in the law without encountering such problems. For an example of this, we can examine the practices in Australia.

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<sup>1009</sup> Australian Government Guidelines on the Recognition of Sex and Gender, July 2013, Located at <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>, accessed 26/03/2020

<sup>1010</sup> Australian Government Guidelines on the Recognition of Sex and Gender, July 2013, Located at <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>, page 4

<sup>1011</sup> For example see the judgement in *M v. M*, [1991] NZFLR 337

<sup>1012</sup> Gender Recognition Bill in Standing Committee A, House of Commons, 2nd sitting 9th March 2004 (afternoon), Located at <https://publications.parliament.uk/pa/cm200304/cmstand/a/cmgend.htm>, accessed 26/11/2020, Column 63

<sup>1013</sup> *Ibid*

<sup>1014</sup> Including social factors, as discussed in *Negotiating intersex: A case for revising the theory of social diagnosis*, Jenkins TM, Short SE, Soc Sci Med. 2017 Feb;175:91-98

<sup>1015</sup> Gender and sex-time to bridge the gap, Dotto G. P. (2019), EMBO molecular medicine, 11(5), e10668

<sup>1016</sup> Gender Recognition Bill in Standing Committee A, House of Commons, 2nd sitting 9th March 2004 (afternoon), Located at <https://publications.parliament.uk/pa/cm200304/cmstand/a/cmgend.htm>, accessed 26/11/2020, Column 63

As mentioned previously, Australia is in many ways the exception to the notion that the jurisdictions examined do not identify sex and gender as being separated. The Australian federal government has a unified set of guidelines on gender and sex recognition<sup>1017</sup>. These guidelines define sex and gender in the following manner:

“sex refers to the chromosomal, gonadal and anatomical characteristics associated with biological sex.”<sup>1018</sup>

“Gender is part of a person’s personal and social identity. It refers to the way a person feels, presents and is recognised within the community. A person’s gender may be reflected in outward social markers, including their name, outward appearance, mannerisms and dress.”<sup>1019</sup>

Such definitions reflect the more standard definitions of sex and gender<sup>1020</sup> and, as these guidelines are focused on data collection, allow for the collection of more representative, accurate and granular data, as they allow for more categories of refinement by which the data can be examined and the clarity of definitions removes potential ambiguities. More recently statistics New Zealand has also adopted similar guidelines<sup>1021</sup>

It is worth noting that these guidelines only apply to the federal government of Australia, and as such the governments of each state and territory is free to make its own rules regarding

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<sup>1017</sup> Australian Government Guidelines on the Recognition of Sex and Gender, July 2013, Located at <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>, accessed 26/03/2020

<sup>1018</sup> Australian Government Guidelines on the Recognition of Sex and Gender, July 2013, Located at <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>, accessed 26/03/2020, paragraph 11

<sup>1019</sup> Australian Government Guidelines on the Recognition of Sex and Gender, July 2013, Located at <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>, accessed 26/03/2020 paragraph 13

<sup>1020</sup> Glossary of terms, Stonewall, Located at <https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms>, accessed 11/01/2021

<sup>1021</sup> Sex, gender and sexual orientation, Stats NZ, 24th September 2019, Located at <https://www.stats.govt.nz/reports/sex-gender-and-sexual-orientation>, accessed 26/03/2020

such data collection. Regarding the law beyond guidelines that acknowledge a difference between sex and gender there are some hints at this separation existing in substantive law in Australia, for example intersex status is recognised as a protected characteristic in the national law, separately from gender identity and sex, which are also protected characteristics<sup>1022</sup>. It is worth noting that discrimination law is not discussed in depth in this document, as while it can have practical impacts on how a person's gender is interacted with in practice, due to time and space limitations this document focuses on gender and sex recognition and classification. As such this piece of discrimination law will not be examined in detail, but merely serves to illustrate a separation of gender and sex in the law of Australia. With regards to gender and sex recognition and classification, while some aspects are managed by the federal government, such as passports, others such as birth certificates and prisons are managed by the individual states and territories.

The law in Tasmania is particularly noteworthy in this regard, for a number of reasons, but particularly due to how it handles a distinction between sex and gender, which may be illustrative of how a distinction between sex and gender can be implemented in law, while accomplishing a number of goals and circumventing a number of problems. In 2019 legislation was introduced that amended a number of aspects of Tasmanian law relating to gender and sex recognition<sup>1023</sup>. For the purposes of this section the most relevant amendments were made to the Births, Deaths and Marriages Registration Act 1999, although other amended pieces of legislation will be discussed later. The amended Act recognises both sex and gender as separate, but overlapping in some respects. It requires sex to be registered within 60 days of birth, or 120 days if the “sex characteristics do not allow for easy assignment of sex”<sup>1024</sup>. Sex is also only to be registered as male or female, which cannot be changed except to correct an error<sup>1025</sup>. However, the law also states that references to a person's sex in any law in the state shall be interpreted as referring to a person's registered sex, or registered gender<sup>1026</sup>. A person can register their gender by submitting the appropriate form and a declaration and notably does not require medical evidence<sup>1027</sup> and can be registered as male, female, indeterminate gender, non-binary or “a word, or a phrase, that is used to

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<sup>1022</sup> Sex Discrimination Act 1984, compilation No 41, Compilation date: 9 December 2018

<sup>1023</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019

<sup>1024</sup> Births, Deaths and Marriages Registration Act 1999 Section 15

<sup>1025</sup> Births, Deaths and Marriages Registration Act 1999 Section 16

<sup>1026</sup> Births, Deaths and Marriages Registration Act 1999 Section 28D

<sup>1027</sup> Births, Deaths and Marriages Registration Act 1999 Section 28A (2)



indicate a person's perception of the person's self as being neither entirely male nor entirely female”<sup>1028</sup>. Once a person's gender has been registered their registered sex ceases to be their registered sex and any previously registered gender is replaced by the gender registered by the most recent successful application<sup>1029</sup>. The result of this is that everyone has a registered sex, however this is essentially replaced by their registered gender should they choose to register one.

This arrangement serves a number of functions. Firstly by assigning everyone a legal sex at birth it essentially allows the current laws which rely on this classification to continue functioning. It also acknowledges that what is assigned at birth is sex, rather than gender, as knowing a person's gender at that stage may well be impossible and avoids the cis-normative assumption that gender will correspond to sex. Restricting this to male or female caters to intersex groups which have asked that intersex not be made a new category (if such categories remain on legal documents) that be assigned to children for fears that it would be stigmatizing<sup>1030</sup>. Allowing gender to be registered based on declaration reflects current best practice<sup>1031</sup>, removes procedural barriers to accessing recognition and acknowledges that the individual is the person best placed to be expert on their own experience of their gender identity<sup>1032</sup>. The system whereby registering one's gender to remove and essentially replace one's registered sex, in function if not in name allows for transgender people to have their genders recognised in as legally valid a form as cisgender people. This system also circumvents the problem mentioned in the UK, whereby separating sex and gender would amount to a use of semantics to exclude transgender people from gendered spaces<sup>1033</sup>. This is because sex is defined as being either registered sex or registered gender, and one's registered sex ceases to be once a gender is registered. As such one is never in a situation where one's registered sex is different to their registered gender, and one replaces the other and substitutes for all legal situations within the state. As such the approach taken in Tasmania may be a

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<sup>1028</sup> Births, Deaths and Marriages Registration Act 1999 Section 3A (1) (f)

<sup>1029</sup> Births, Deaths and Marriages Registration Act 1999 Section 28C (7)

<sup>1030</sup> The Darlington Statement, 10/3/2017, Located at <https://darlington.org.au/statement/>, accessed 14/12/2020, para 8 (b)

<sup>1031</sup> TGEU Best Practice Catalogue, 22/02/2017, Located at <https://tgeu.org/human-rights-gender-identity-best-practice-catalogue/>, Accessed 18/01/2020

<sup>1032</sup> TGEU Best Practice Catalogue, 22/02/2017, Located at <https://tgeu.org/human-rights-gender-identity-best-practice-catalogue/>, Accessed 18/01/2020

<sup>1033</sup> As discussed in Gender Recognition Bill in Standing Committee A, House of Commons, 2nd sitting 9th March 2004 (afternoon), Located at <https://publications.parliament.uk/pa/cm200304/cmstand/a/cmgend.htm>, accessed 26/11/2020, Column 63

useful model for other states that wish to acknowledge the separation of sex and gender, cater to the needs of the intersex community and provide recognition and full legal protections to transgender people.

#### Multiple / fragmented legal genders.

It is also worth acknowledging that all of the jurisdictions examined feature multiple legal genders. This is again due to the modern law in these jurisdictions having a common ancestor in the UK due to colonialism. The UK as discussed in the chapter relating to that jurisdiction, did not, in law, have a single legal gender for all purposes until the introduction of the Gender Recognition Act in 2004. The complexities of this in the UK, including relevant caselaw can also be found in the chapter concerning the UK, as can elaboration on the idea of recognising different legal genders for different purposes. New Zealand explicitly states that it does not have a single legal definition of gender<sup>1034</sup>, whereas in Australia, the UK and India the existence of multiple legal genders can be deduced from practice. This is possible because in each of these jurisdictions, as discussed in their corresponding chapters, different services recognise a person's gender for different purposes separately based on their own criteria, which do not necessarily confirm to a unified single legal gender.

It is worth noting that while the law in these jurisdiction features the existence of different legal genders for different purposes this does not necessarily mean that all recognised genders are as substantive or as useful as others. There are two situations in which one recognised gender can have greater validity or usefulness than another. The first can be seen in the UK, where the Gender Recognition Act states that upon receipt of a gender recognition certificate that persons legal gender becomes as stated on the certificate for all purposes<sup>1035</sup>. In this way a gender recognition certificate “trumps” all other forms of legal gender and removes possible disparity of genders for different purposes. It may be of interest to note that this explicit “for all purposes” language is not found in any of the other jurisdictions examined.

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<sup>1034</sup> Human rights commission report: to be who I am, Report of the inquiry into discrimination experienced by transgender people 2007 located at [https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008\\_14-56-48\\_HRC\\_Transgender\\_FINAL.pdf](https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf), accessed 17/12/2020 at 8.5

<sup>1035</sup> Gender Recognition Act 2004, Section 9

The other situation can be seen in Australia, where to change one's gender recognised on one's passport one can use either medical evidence or a valid gender recognition certificate or an amended birth certificate. As such while recognition for the purpose of passport sets its own criteria, separate from other forms of recognition, it also permits other forms of recognition to be used as evidence for the purpose of passports<sup>1036</sup>. This results in a de-facto hierarchy of gender recognition documents, where some documents can be used as “master documents” for the purposes of other forms of recognition.

The reason for this de-facto hierarchy despite multiple legal genders existing for different purposes can be seen as being due to two of the objectives that gender recognition laws seek to achieve. As discussed in the chapter related to the UK, there can be a tension in gender recognition laws between the right to be seen vs the right to disappear<sup>1037</sup>. The right to be seen is catered to by allowing for different purposes to have different criteria, which, at least notionally, allows for as many people to be recognised according to the particular requirements of each purpose. It also allows for criteria for recognition to change according to changes in social ideas of gender faster than a legislature would be able to implement criteria for a single unified legal gender. The right to disappear, as discussed in the UK chapter, which can be required to prevent discrimination or other negative outcomes, is in turn catered to by the ability for certain documents to function as “master documents” such as gender recognition certificates. In this way these systems, with varying degrees of clarity and certainty, cater to both needs which both seem to be required for a gender recognition system to function free from a number of undesirable consequences.

### How is recognition managed

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<sup>1036</sup> Australian Government, Department of Foreign Affairs and Trade, Sex and gender diverse passport applicants, Located at <https://www.passports.gov.au/passports-explained/how-apply/eligibility-citizenship-and-identity/sex-and-gender-diverse-passport>, accessed 27/03/2020

<sup>1037</sup> Discussed at page 194

How gender recognition is managed can have a profound impact on how they system behaves in practice. This section will examine how jurisdictions manage gender recognition, which persons or agencies have responsibility for it, and how this may change the system as a whole

As discussed earlier all of the jurisdictions discussed recognise a person as having different genders for different purposes<sup>1038</sup> which necessarily results in the powers to determine gender for different purposes resting with various individuals or agencies depending on the circumstance. This is due to the majority of cases in which the law recognises gender occurring within the “relevant but not essential” category discussed in Corbett<sup>1039</sup>. The result of this is that gender recognition is not just a matter of determining who has the authority to recognise a person’s gender, it is also a matter of *when* may particular persons recognise one’s gender.

All of the jurisdictions recognised have different criteria for various purposes, with the ability to change these criteria resting with the recognising individual or agencies<sup>1040</sup>. This can be demonstrated by the fact that one can observe recognition criteria that differ from legislation, can be obtained before obtaining recognition from legislation and that these criteria in a number of cases were implemented before legislation<sup>1041</sup>. The result of this is that individuals in these jurisdictions are, in many cases, able to exert a significant amount of control of how gender is recognised in their communities. For example in the UK schools can, and do, recognise the identities of their transgender students<sup>1042</sup> who are too young to be able to obtain legal gender recognition<sup>1043</sup>. This can not only be a caring compassionate gesture, but can be shown to help improve a transgender persons mental health, which can help reduce the chances of transgender people in that community of committing suicide<sup>1044</sup>. However despite

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<sup>1038</sup> See page 209

<sup>1039</sup> Discussed starting on page 125

<sup>1040</sup> See chapters on individual jurisdictions for details

<sup>1041</sup> As was the case in Australia and India

<sup>1042</sup> Schools Transgender Guidance, Cornwall Council, 2015, Located at [https://www.cornwall.gov.uk/media/13620644/schools-transgender\\_guidance\\_booklet-2015.pdf](https://www.cornwall.gov.uk/media/13620644/schools-transgender_guidance_booklet-2015.pdf), accessed 07/01/2021, page 13

<sup>1043</sup> Gender Recognition Act 2004, Section 1(1) requires that a person be aged at least 18 to receive a gender recognition certificate

<sup>1044</sup> Legal gender marker and name change is associated with lower negative emotional response to gender-based mistreatment and improve mental health outcomes among trans populations, Arjee Restar, Harry Jin, Aaron Breslow, Sari L. Reisner, Matthew Mimiaga, Sean Cahill, Jaclyn M.W. Hughto, SSM - Population Health 11 (2020) 100595, Located at <https://www.sciencedirect.com/science/article/pii/S2352827320302329?via%3Dihub>, accessed 08/01/2021

this notional degree of latitude this flexibility may not always exist in practice. In some cases social norms may be sufficiently uniform within the jurisdiction so as to render any flexibility unused, as individuals may not wish to use it or think to use it. Additionally sometimes this flexibility goes unused not because people would not wish to use it, but because they do not know that they can. As pointed out by the 2016 UK review, individuals may see national legislation as a rule that applies to all, rather than as a minimum standard with individuals and agencies remaining free to adopt lesser criteria in most situations<sup>1045</sup>.

This style of recognition serves a number of purposes. Recognition done in this way allows for social norms and standards of recognition to potentially change before legislatures can act, which may take some time, as can be seen in India<sup>1046</sup> and the UK<sup>1047</sup>. It also avoids a “one size fits all” solution. This can be important, as gender and sex, as categories are used for a number of different purposes, and the same definitions of those categories may not be equally suitable for every purpose. For example when introducing a policy to test women over a certain age for cervical cancer a government may have a set of features they expect / desire in the term “woman” than a bank would when asking for gender to avoid misgendering a client in correspondence. In this way allowing different organisations to set their own recognition criteria serves to allow these categories to be used in ways that make sense for organisations with different purposes in mind. However it is possible that many situations in which gender categories are used would be better served by using different categories that may be more granular. To return to the example of cervical cancer screening, because some people who may be at risk for this kind of cancer may be transgender men, and as such would be disposed not to identify as women when asked. Even though a custom definition of the term woman could be used and explained, this would still misgender transgender men or non-binary people. As such it may be better in such a case to use the category of “persons with a cervix”, and to explain that this includes most women and trans men and non-binary people who were assigned female at birth. Because of situations like this, where more granular categories may be more useful than using the male and female categories which may not

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<sup>1045</sup> Transgender equality, first report of the session 2015-2016 HC 390, House of Commons Women and Equalities Committee, Published on 14 January 2016 located at <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, accessed 07/01/2021, paragraph 143

<sup>1046</sup> 6 years passed between the 2014 NSLA ruling and the 2019 legislation

<sup>1047</sup> The women and equalities committee published a report in 2015, the recommendations have still not been implemented.

correspond exactly to what one intends, the idea of “de-gendering” , adopting policies which render gender less relevant, has been proposed<sup>1048</sup>, as has the idea of eliminating the official registration of gender all together<sup>1049</sup>. While this will be discussed in more detail later it is worth mentioning at this stage to serve as a reminder that while flexible gender recognition criteria can be useful, the categories used may not always be useful. Additionally the purposes for which gender recognition is granted may be less well served by flexible recognition criteria than they would be by simply ceasing to categorize people by gender for that purpose.

In the UK gender is “set” by the final legislation “for all purposes”<sup>1050</sup>, as such while multiple genders may be recognised for a person for various purposes, their legal gender becomes unified for all purposes at the moment of receiving a gender recognition certificate. Similarly, in all of the jurisdictions examined, as mentioned previously in this chapter, different forms of gender recognition can be seen as forming a hierarchy, as one form can be used as evidence for other purposes. Both of these mechanisms can serve to unify a person’s legal genders for all purposes once they have met a certain evidential threshold. This does not act contrary to the recognition as multiple genders and can be seen as complimentary to it. As discussed previously the ability to ensure that if a person meets certain criteria they can always have their gender recognised has benefits that curb some of the disadvantages of the recognition of differing genders for differing purposes<sup>1051</sup>. It allows a person to effectively conceal their transgender status to escape possible discrimination<sup>1052</sup>. In a situation in which one must negotiate one’s gender with each agency separately, it may be that a transgender person faces a significant burden, as on each occasion they must content with social notions of gender in addition to the requirements of a specific purpose. The ability to ensure recognition for all purposes if a certain standard of evidence is met may serve to lessen this burden and ensure that the less progressive elements of society find their ability to disadvantage transgender people to be limited.

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<sup>1048</sup> Discussed as “de-emphasising sex” in “No Man’s Land”: Non-binary Sex Identification in Australian Law and Policy”, Bennett, Theodore,(2014) 37 University of New South Wales Law Journal 847

<sup>1049</sup> The Abolition of Sex/Gender Registration in the Age of Gender Self-Determination: An Interdisciplinary, Queer, Feminist and Human Rights Analysis, Cannoot, P and Decoster, M, (2020) 1 International Journal of Gender, Sexuality and Law 26.

<sup>1050</sup> Gender Recognition Act 2006 Section 9 (1)

<sup>1051</sup> See page 210

<sup>1052</sup> As discussed in Goodwin v United Kingdom (2002) 35 E.H.R.R. 18

Contrary to the above, it is worth noting that some jurisdictions, such as Tasmania, recognise a legal sex at birth, which is one's legal sex for the purpose of all law in that jurisdiction<sup>1053</sup>, and as such functions as one's "legal gender" in a more unified manner than in other jurisdictions. However it is worth noting that Tasmania is a part of Australia, which is a federal jurisdiction<sup>1054</sup>. As such a person living in Tasmania must interact with matters reserved for the national government, such as passports. Australian passport rules allow for a person to have their gender recognised if they submit sufficient medical evidence, regardless of if they have a recognition certificate issued by their state<sup>1055</sup>. As such it is possible for a person living in Tasmania to have different legal genders for different purposes, as this is a feature of gender recognition law retained on the federal level. It is worth noting that this may have minimal impact in practice. This is because having one's gender recognised in Tasmania has less rigorous evidential requirements than are used for passports, so it is more likely that a person will have their gender registered by the Tasmanian government which will then suffice on its own as evidence for passport purposes. As such Tasmania is still an example of a jurisdiction in which a person can have multiple recognised legal genders despite being the closest of the jurisdictions examined to having a single defined legal gender.

This consideration of Tasmania raises another important issue with regards to how gender recognition is managed, that of federal jurisdictions. Out of the jurisdictions examined both Australia<sup>1056</sup> and India<sup>1057</sup> are federal jurisdictions. Different countries often reserve different powers of national and regional governments. This can particularly complicate matters regarding gender recognition and one's "legal identity", particularly when different levels of government control different forms of recognition and follow different rules. For example while one's birth certificate may be governed by the national government, one's driving licence may be governed by the state or territory. Not only may control of various recognition

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<sup>1053</sup> Births, Deaths and Marriages Registration Act 1999 Section 28C (7)

<sup>1054</sup> Commonwealth of Australia Constitution Act 1900, Section 107

<sup>1055</sup> Australian Government, Department of Foreign Affairs and Trade, Passports explained, Sex and gender diverse passport applicants, Located at <https://www.passports.gov.au/passports-explained/how-apply/eligibility-citizenship-and-identity/sex-and-gender-diverse-passport> accessed 07/08/2019

<sup>1056</sup> Commonwealth of Australia Constitution Act 1900

<sup>1057</sup> The Constitution of India, 1949, located at [https://www.india.gov.in/sites/upload\\_files/npi/files/coi\\_part\\_full.pdf](https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf), accessed 08/01/2021

documents be governed differently due to this, but this can also apply to the institutions that interact with one's legal gender, particularly prisons which may also be governed differently depending on the region they are located in. Furthermore the division of gender recognition types and methods is not consistent between jurisdictions. For example in Australia birth certificates are dealt with at the state / territory level, whereas in the UK they are dealt with nationally. Although it is worth noting that in the UK due to devolution some matters differ, for example in Scotland parts of the Gender Recognition Act are different<sup>1058</sup>, particularly the spousal veto. As such the law in the UK can be a somewhat complex, as different devolved regions have different powers, as can be seen by the fact that Welsh prisons are governed by the English prison rules<sup>1059</sup>, in contrast with Scotland which has its own rules regarding trans people in prisons<sup>1060</sup>.

This distribution of gender recognition related powers and responsibilities can have a number of impacts on individuals seeking recognition. Having to communicate with multiple agencies all with different rules and requirements can be time consuming and confusing, especially as one has to learn which agencies have responsibility over recognition in which aspects of one's life. This also has the same negative impacts as can be produced by recognising different legal genders for different purposes, in so much as different standards among recognising bodies can result in a person having different genders recorded in different documents, which can cause a person to be outed and can have a number of other of negative impacts on their life<sup>1061</sup>.

However it is possible that this method of governance of gender / sex recognition issues can have positive aspects. One of the purposes of such governance in general is to give residents of a particular region more say in how their lives are governed, as such regulating gender in this way may allow more progressive rules to be put in place more easily in more progressive areas. Of course the inverse may also be true, that less progressive areas may find it easier to

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<sup>1058</sup> Gender Recognition Act 2006 Section 3C

<sup>1059</sup> The care and management of individuals who are transgender, HM Prisons and Probation Service, Ministry of Justice, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019

<sup>1060</sup> Scottish Prison Service Gender Identity and Gender Reassignment Policy, March 2014, Located at [http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562\\_1392.pdf](http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562_1392.pdf), accessed 05/11/2019

<sup>1061</sup> Discussed on page 142



institute less progressive rules. Additionally, as different documents are used with different frequencies and have different measures of impact on a person's lives it may be desirable to distribute these measures so that locals have as much say as possible about how their lives are lived on a day to day basis, while allowing some documents to be governed by national rules to maintain a degree of consistency. Reserving some powers for the national government in this way may also be used to guarantee that no matter what is done on a local level, citizens will always have a right to recognition if certain minimum criteria are met, with states free to experiment with less restrictive evidential requirements if they desire. This may also allow for regional governments to "experiment" with whatever rules they believe will work best for them, and to function as "laboratories of democracy", while allowing a guarantee of recognition and the rights that can accompany it if they meet the requirements at the national level.

In addition to differing in terms of which level of government controls which aspects of gender and sex recognition jurisdictions also differ in terms of how particular documents are governed. This is most evident when looking at birth certificates, which tend to have specific pieces of legislation governing their creation and amendment, rather than this being decided by rules made at the executive level. As such the rules regarding birth certificates are subject to a greater degree of legislative scrutiny, which may reflect a perceived higher degree of importance. This perception can also be observed from the fact that a birth certificate will usually serve as evidence of one's gender for the purpose of changing any other recognising document<sup>1062</sup>. Perhaps due to this perceived higher degree of importance birth certificates tend to be the focus of much of the formal regulation on legal gender and sex identity so can serve as good examples of differing approaches to regulating gender and sex identity when this is deemed particularly important. This regulation is done in a number of different ways, with one of the largest and most readily observable differences being between jurisdictions that use special panels for gender recognition, those that use declarations from the court, and those that use individual declarations (sometimes referred to as "self-identification")

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<sup>1062</sup> See examples discussed earlier, including passports and drivers licences.

It is also important to note that the body which governs gender recognition does not always have the final say in setting the rules of recognition. An example of this can be seen in the case of *Norrie*, in which the high court found that intersex individuals were entitled to be recognised as having a “non-specific” sex<sup>1063</sup>. This decision arguably paved the way for more widespread recognition of genders and sex more broadly throughout Australia. Similarly the Rights of Transgender Persons Act 2019<sup>1064</sup> and the previous bills attempting to accomplish similar goals<sup>1065</sup> were responses to the outcome of *National Legal Services Authority v. Union of India*<sup>1066</sup>. The demonstrates an important relevant issue, the power and role of the legislature. In some jurisdictions the courts are able to compel the legislature to make law or to strike down unconstitutional laws. However some jurisdictions maintain a doctrine of parliamentary supremacy, which means that the courts cannot strike down law which is passed by parliament through a valid procedure regardless of the content of the law<sup>1067</sup>. Out of the states examined Australia and India do not have parliamentary supremacy<sup>1068 1069</sup>, while New Zealand and the UK do<sup>1070 1071</sup>. The result of this is that it must be acknowledged that in some jurisdictions changes in gender recognition systems can originate from the courts, whereas in others the recognition must be initiated by parliament. The UK is interesting in this regard, particularly in terms of gender recognition, due to its history. While the UK does maintain parliamentary supremacy, it did not legislate on gender recognition until 2004 after being found in violation of the European Convention on Human Rights in *Goodwin v UK* in 2002<sup>1072</sup>. This can serve to demonstrate that, particularly when it comes to human rights, states which do have a doctrine of parliamentary supremacy can be responsive to issues raised by the courts, rather than the legislature.

This can be significant, as courts and parliaments are fundamentally different bodies, with different procedures, compositions and purposes. For example a court necessarily responds to real disputes or injustices raised by individual cases, whereas parliament legislates based

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<sup>1063</sup> *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11

<sup>1064</sup> The Transgender Persons (Protection of Rights) Act 2019 No 40 of 2019

<sup>1065</sup> The Transgender Persons (protection of rights) Bill, 2016

<sup>1066</sup> *National Legal Services Authority v. Union of India and others* WP (Civil) No 400 of 2012

<sup>1067</sup> *An Introduction to the Study of the Law of the Constitution*, A.V. Dicey, 8th edition, 1915, pages 3-4

<sup>1068</sup> *The Constitution of India*, 1950

<sup>1069</sup> Goss, Ryan, What Do Australians Talk About When They Talk About ‘Parliamentary Sovereignty’?, Public Law Conference (Melbourne, July 2018)

<sup>1070</sup> *Rothmans of Pall Mall (NZ) Ltd v A-G* [1991] 2 NZLR 323 at 330

<sup>1071</sup> *R (Jackson) v Attorney General* [2005] UKHL 56, para 9

<sup>1072</sup> *Goodwin v. United Kingdom*, Application no. 28957/95

largely on the agenda of the government of the day. The result of this is that courts and legislatures will respond differently to societal conditions and at different rates. From examining the jurisdictions discussed thus far it is possible to observe that three out of the four of them have implemented gender recognition measures after being prompted by the courts. While this sample size is very small, it may indicate that courts seem to be able to create change on this issue more quickly than legislatures are able to. This may be because courts are necessarily more responsive to individual injustices, whereas parliaments require the issue to be on the legislative agenda of the government, which may require a threshold of attention, awareness and perceived importance that certain issues, particularly those concerning small minorities of the population may struggle to reach.

Not only may courts, legislatures and executive bodies be responsive at different speeds and to different stimuli, but they may also differ in how the law made by these bodies are dealt with by the public. This is because not only do these bodies work differently, but they are themselves perceived differently by the public. For example a legislature made up by elected members of parliament, voted for by the citizens of the jurisdiction may be perceived as more representative of the will of the people than a court composed of unelected judges. As such there is a risk of law made by a court may be perceived, by those who disagree with the ruling, as being an illegitimate dictate imposed on the populous by an unelected elite. While a court may respond more quickly to a problem in the law this possibility of perceived illegitimacy may keep an issue under active debate in the public discourse<sup>1073</sup>. This perception of the law not being truly settled in a legitimate way leading to active public debate is particularly relevant with regards to the law related to the rights of those who are vulnerable to being discriminated against. While constant debate and discussion can be perceived as positive and a mechanism through which liberal societies can come to converge on positive answers to social issues, it is worth noting that in the case of the rights of minorities this debate can come at a cost. Continued debate about the legitimacy of their rights or even the nature of their existence itself can be experienced as a form of “hammering”, a source of stress due to one’s constant feeling of having one’s fundamental rights being under siege<sup>1074</sup>. While constant stress may be dismissed as a regrettable but

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<sup>1073</sup> For example see the ongoing debates about *Roe v Wade* in the United States, *Roe v Wade* at 40: if the law was settled in 1973, the controversy is anything but, Dahlia Lithwich, *The Guardian*, 22 Jan 2013, Located at <https://www.theguardian.com/commentisfree/2013/jan/22/roe-v-wade-40-law-controversy>, accessed 19/05/2020

<sup>1074</sup> Sara Ahmed; *An Affinity of Hammers*. *TSQ* 1 May 2016; 3 (1-2): 22–34.

ultimately not particularly meaningful cost, it is worth nothing that stress can have a number of profound impacts on a person's health and wellbeing<sup>1075</sup> as well as their ability to function in society, this is compounded by the fact that this group is particularly vulnerable to discrimination, hate crimes and lower incomes which can all lead to worse material conditions which may leave them less able to cope with the aforementioned stress. Given that this cost due to this continued debate may be harmful as well as leading to possible future reversal of positive changes in the law, it may be worth considering legislative action may be desirable to "back up" any law made by the courts. This could accomplish a number of goals, including improved specificity and precision, as well as providing more certainty as to the relevant legal rights. This approach has been taken by the majority of the jurisdictions examined which began to recognise transgender and intersex identities due to court judgements. While a complete analysis of the issue of perceived legitimacy of court judgements relating to minority rights is better addressed in other works, it is still worth considering here as a part of the many factors that may be relevant when evaluating the pros and cons of different approaches to legal gender and sex classification.

In addition to examining which bodies may make rules regarding gender recognition, it is also interesting to examine differences in which bodies govern individual gender recognition decisions. The examined jurisdictions have approached this in a variety of ways, the UK has opted for gender recognition panels<sup>1076</sup>, in New Zealand one must apply to the court<sup>1077</sup>, Australian states and territories have opted for a number of different approaches including panels<sup>1078</sup>, courts<sup>1079</sup> and "self-identification"<sup>1080</sup>. In India a person must make an application to the district magistrate to be recognised as transgender, and apply a second time to be recognised as male or female after having surgery<sup>1081</sup> or through the new process introduced in the 2020 rules, which is more akin to self-recognition<sup>1082</sup>. The differences in procedure and

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<sup>1075</sup> Minority stress and physical health among sexual minority individuals, David M. Frost, Keren Lehavot, Ilan H. Meyer, *J Behav Med.* 2015 Feb; 38(1): 1–8.

<sup>1076</sup> Gender Recognition Act 2004, Schedule 1

<sup>1077</sup> Births, Deaths, Marriages, and Relationships Registration Act 1995, Public Act 1995 No.16 s.28

<sup>1078</sup> Gender Reassignment Act 2000, Located at [www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol\\_act/gra2000200/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/gra2000200/), accessed 23/08/2019

<sup>1079</sup> Births, Deaths and Marriages Registration Act 1996, Located at <https://www.legislation.sa.gov.au/LZ/C/A/Births%20Deaths%20and%20Marriages%20Registration%20Act%201996.aspx>, accessed 22/08/2019

<sup>1080</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, Located at <https://www.legislation.tas.gov.au/view/html/asmade/act-2019-007>, accessed 23/08/2019

<sup>1081</sup> The Transgender Persons (Protection of Rights) Act 2019 No 40 of 2019 Sections 4-7

<sup>1082</sup> Transgender Persons (Protection of Rights) Rules, 2020

evidence will be addressed later, but differences in who manages the process are worth mentioning here. In jurisdictions which use panels or applications to the court the purpose of these bodies seems to be to assess if the evidential requirements listed in the statute have been met<sup>1083</sup>, although in the UK the panel does seem to do more than simply checking that the process has been followed, and contains medical personnel who do seem to scrutinise the medical evidence provided as can be seen in the Jay case<sup>1084</sup>. As that case shows, this level of scrutiny has, in that case at least, been misguided in its focus<sup>1085</sup>. It is beyond the scope of this piece of work to fully examine the appropriateness of these bodies however it should be noted that a number of organisations and individuals have made well reasoned cases as to why these models should be replaced with a self-recognition model<sup>1086</sup>, as ultimately they represent an attempt to objectively determine something which the individual remains the person best placed to evaluate. However, it has been pointed out that self-declaration models cannot solve all the problems faced by transgender and intersex people without addressing problems such as lack of access to healthcare<sup>1087</sup>.

## Who can be recognised?

Every jurisdiction which has a gender or sex recognition process has some sort of limitation on who may be recognised by that process. Even in the jurisdictions with the fewest restrictions recognition may be limited to those who are willing to sign a legally binding declaration of their identity<sup>1088</sup>, may not recognise non-binary or intersex identities<sup>1089</sup> or be

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<sup>1083</sup> The Transgender Persons (Protection of Rights) Act, 2019 NO. 40 of 2019

<sup>1084</sup> Jay v Secretary of State for Justice [2018] EWHC 2620 (Fam)

<sup>1085</sup> Jay v Secretary of State for Justice [2018] EWHC 2620 (Fam) paragraph 94

<sup>1086</sup> Ten Years of Gender Recognition in the United Kingdom: Still a “Model for Reform”?, Dunne, Peter, 2015, Public Law (4): 530–539.

<sup>1087</sup> Governing Legal Embodiment: On the Limits of Self-Declaration, Dietz, C, Fem Leg Stud 26, 185–204 (2018)

<sup>1088</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, Located at <https://www.legislation.tas.gov.au/view/html/asmade/act-2019-007>, accessed 23/08/2019

<sup>1089</sup> Births, Deaths and Marriages Registration Act 1996 located at [http://www.austlii.edu.au/au/legis/vic/consol\\_act/bdamra1996383/](http://www.austlii.edu.au/au/legis/vic/consol_act/bdamra1996383/), accessed 23/08/2019

restricted to those of a certain age<sup>1090</sup>. However, as discussed previously in the discussion of *Corbett v Corbett* the vast majority of gender recognition occurs in situations where gender is “relevant but not essential” where gender recognition is negotiable and therefore largely unregulated. As such in these situations those recognising the gender may recognise whoever they wish in whatever way they wish. Because of this limitations on who is recognised apply only to situations where the mechanism of recognition is regulated by the government, whether this is due to a decision by the executive (as is usually the case with passports), or by legislation (as is usually the case with birth certificates).

A number of jurisdictions place restrictions on the gender recognition methods available to a person based on their age. This can be done by barring access to certain processes, such as the UK preventing those under 18 from acquiring a GRC<sup>1091</sup> or by requiring their parents to apply for them<sup>1092</sup>. While there are a number of ongoing complex discussions regarding transgender and intersex children and what their rights should be there is simply not space within this work to deal with this issue in great depth. This is mainly because ideas about to what degree a child should have autonomy from their parents differ significantly and to engage with this issue would involve a level of engagement with the philosophical and ethical issues which would not be viable. From the legal perspective there are a number of issues regarding age that are worth remarking on.

Firstly, as gender recognition is, in most cases, granted to cisgender children at birth, it may be potentially unjust to withhold this same right from their transgender peers for a number of years. This difference in treatment must be justified, which is complicated by many common arguments used to justify it appear to be somewhat flawed. For example the notion that a child cannot be trusted to know their own identity with any certainty ignores that if this is the case then it would also be the case for a cisgender child, and is thus at best not a good argument for differential treatment, but for withholding gender recognition from all children, including based on sex assigned at birth.

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<sup>1090</sup> Gender Recognition Act 2004, Section 1

<sup>1091</sup> Gender Recognition Act 2006 Section 1 (1)

<sup>1092</sup> Births, Deaths and Marriages Registration Act 1996, No.26 of 1996, Located at <https://legislation.nt.gov.au/en/Bills/Births-Deaths-and-Marriages-Registration-Bill-1996?format=assented>, accessed 22/08/2019

Secondly it is worth noting that the nature and consequences of legal gender recognition are entirely determined by the governing body. As such any claim that children should not have their gender recognised due to the consequences of such a decision cannot be an argument against gender recognition, but is rather an argument against a specific gender recognition system. For example in some jurisdictions a person must have surgery prior to recognition<sup>1093</sup>. The decision to undergo gender recognition in such a jurisdiction would therefore have much more serious consequences than on a jurisdiction that does not have this requirement. The same can be said regarding jurisdictions requiring a person to state that they intend to live in the recognised gender until death<sup>1094</sup>. This is indeed a serious decision, but this decision is not an intrinsic part of gender recognition. As such any argument from consequences must also examine if the consequences in the relevant jurisdiction are a necessary part of gender recognition or an addition that may not be necessary.

Thirdly it should be noted that gender recognition at various levels, including being addressed by their name and pronouns is suggested by evidence to be just as beneficial to the wellbeing of transgender children as it is to transgender adults<sup>1095</sup>. As such it may be appropriate to ask whether or not withholding a beneficial intervention, which, depending on the jurisdiction may be reversible, on the basis of age can be justified.

A number of jurisdictions only provide gender recognition for those with binary genders. Out of those jurisdictions that do provide gender recognition for non-binary genders it appears that it is most common to allow for this form of recognition on passports before other documents. For example in India it was possible to have a passport with the sex marked as “T” before it was possible to be recognised as transgender as per the Transgender persons Act. Similarly in Australia the first documents to allow non-binary recognition were

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<sup>1093</sup> The Transgender Persons (Protection of Rights) Act 2019 No 40 of 2019 Section 7

<sup>1094</sup> Gender Recognition Act 2006 Section 2 (1)

<sup>1095</sup> Chosen Name Use is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Behavior among Transgender Youth, Stephen T. Russell, Amanda M. Pollitt, Gu Li, Arnold H. Grossman, J Adolesc Health. 2018 Oct; 63(4): 503–505., Located at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6165713/>, accessed 07/01/2021

passports, which allowed an applicant to have their sex marked as “X”. The crucial question regarding “once this category has been recognised, what should it mean in practice”. Will be discussed later in this chapter. For the purposes of this section it is sufficient to note that many jurisdictions restrict gender recognition for some purposes to binary genders.

Additionally it is interesting to note that while it seems to be most common for jurisdictions to recognise “non-binary” as a unified category, which is interesting given that non-binary describes a diversity of different gender identities. As such it remains to be seen if this option can provide sufficient specificity to provide the benefits of recognition it may seek to provide, as opposed to a system as implemented in Tasmania<sup>1096</sup> which allows for a diverse array of genders.

A number of jurisdictions do not recognise sex and gender as separate<sup>1097</sup>. As such the ability of these jurisdictions to recognise intersex status is limited. However it must be noted that those with intersex characteristics have diverse gender identities<sup>1098</sup>, and while some may wish to be recognised as “intersex” as an identity<sup>1099</sup> they largely interact with gender recognition systems in the same way as the general population. As mentioned previously it may not be desirable to recognise gender and sex as separate from a legal perspective in many situations. The recognition of separate sex and gender categories may cause a number of issues, in addition to the fact that it may not be necessary. As such in terms of access to gender recognition it seems as though the needs of intersex people in this regard can be met by gender recognition systems which cater to the needs of persons who’s gender assigned at birth may not match their identity in general. Similarly, while there have been cases regarding intersex people seeking to be recognised as such<sup>1100</sup>, it appears to be the case that this may be catered for by generally applicable gender recognition systems which cater to non-binary genders in general. This is because the only difference in these cases is the particular physical characteristics of the individual, however if the gender recognition system is sufficiently accessible and does not have anatomical or surgical requirements, these cases would seem to

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<sup>1096</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, Located at <https://www.legislation.tas.gov.au/view/html/asmade/act-2019-007>, accessed 23/08/2019

<sup>1097</sup> Out of those examined in this thesis only Australia recognises them as separate formally, although New Zealand does in some respects.

<sup>1098</sup> The “Normalization” of Intersex Bodies and “Othering” of Intersex Identities in Australia, Carpenter, M. Bioethical Inquiry 15, 487–495 (2018).

<sup>1099</sup> As was the case in NSW Registrar of Births, Deaths and Marriages v Norrie [2014] HCA 11

<sup>1100</sup> Ibid



be rendered no different from that of a person with any other non-binary gender identity seeking recognition.

### How is recognition accessed?

The reason to examine the practical requirements is due to concern for accessibility. A system, no matter how well designed will be of limited usefulness if it cannot be accessed by those it is intended for. Additionally the practical issue of the nature of the requirements for recognition is relevant to how the system of recognition behaves. A system with no evidential requirements is arguably not recognising the same thing as a system with rigorous requirements. As such the question of who may be recognised and how that recognition functions in practice is very much linked to how that recognition is accessed and what the requirements to access it are.

If the gender recognition system requires evidence this will have a significant impact on who will be able to use the system. Evidential requirements can result in exclusion, for example a system which requires surgery will exclude all those who have not had surgery including those who cannot access it. Because of this, evidential requirements reflect the answers devised in that jurisdiction to two questions: Who should be recognised and what shall be sufficient to demonstrate their identity.

The jurisdictions examined reflect a diverse array of answers to these questions. For example India is the only jurisdiction among those examined which requires surgery for someone seeking binary gender recognition<sup>1101</sup>. It is also the only jurisdiction to recognise a separate “transgender” status<sup>1102</sup>, which seems to reflect a difference in how being transgender is conceptualized. Similarly the jurisdictions differ between requiring merely a signed statement

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<sup>1101</sup> The Transgender Persons (Protection of Rights) Act, 2019 NO. 40 of 2019

<sup>1102</sup> Ibid

confirming one's identity<sup>1103</sup> and requiring a medical diagnosis<sup>1104</sup> (or surgery in the case of India).

While ideas about who is deserving of recognition may vary between jurisdictions, not all choices regarding evidential requirements are regarded equally. Surgical requirements have been condemned by the UN and referred to as forced sterilization<sup>1105</sup>, as well as being found to be a violation of the European Convention of Human Rights. How a jurisdiction chooses to recognise gender can be rooted in a number of ideas about gender, from how many genders exist to the extent to which one's legally recognised sex / gender should be linked to anatomical characteristics. While the full scope of these ideas is beyond the scope of this piece of work it is worth noting that compelling cases have been made by a number of academics and organisations for reducing evidential requirements for a number of reasons<sup>1106</sup>.

It is worth noting that evidential requirements make the process more bureaucratic and thus may make it harder to access. The process of gathering evidence and filling in forms is must come out of a person's free time, and because only transgender people need to undergo this process policy makers must be mindful of the unevenly distributed cost in terms of time and effort that such a process entails.

In addition to barriers posed by the process itself specific evidential requirements may pose additional difficulties. Medical requirements may be particularly problematic. In addition to the ethical and human rights<sup>1107</sup> based objections to surgical requirements may deny recognition from those who want to have surgery but who cannot obtain it due to a lack of availability, as was the case in New Zealand where such surgeries were unavailable until

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<sup>1103</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, Located at <https://www.legislation.tas.gov.au/view/html/asmade/act-2019-007>, accessed 23/08/2019

<sup>1104</sup> Gender Recognition Act 2004 Section 3

<sup>1105</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, United Nations General Assembly, Human Rights Council, Twenty-second session, February 2013, Located at [https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf), accessed 09/01/2021

<sup>1106</sup> Ten Years of Gender Recognition in the United Kingdom: Still a "Model for Reform"?, Dunne, Peter, 2015, Public Law (4): 530–539.

<sup>1107</sup> See the recent case of X and Y v Romania, Applications - 2145/16 and 20607/16 where surgical requirements were found to be in contravention of article 8 of the ECHR

recently<sup>1108</sup>. Even lesser medical requirements may still pose significant problems. A 2017 survey showed 24% of transgender people surveyed are prevented from seeking the medical interventions they require due to fear of discrimination<sup>1109</sup>. A transgender person seeking gender recognition may be unable to find or access a medical practitioner willing or able to provide them with the required medical evidence. A particularly striking example of this can be seen in the recent Jay case in England. In this case Jay's attempts to seek recognition were frustrated by the fact that she was in prison<sup>1110</sup>. This can be a poignant example of evidential requirements interacting with other elements of the legal system to create an unjust outcome.

Additionally medical requirements may pose problems due to the overlap of requiring gender recognition and other characteristics. For example, in jurisdictions where the recognition process is the same for transgender and intersex people, an intersex person seeking recognition may have to grapple with additional trauma related to their past treatment in order to obtain such evidence<sup>1111</sup>. Additionally there may be financial implications, particularly if the jurisdiction does not have a public health service or if it is not available to everyone. As a result those who lack financial means may find themselves unable to access the recognition they would otherwise be entitled to. This also occurs when a jurisdiction implements a fee to access gender recognition.

The cost of obtaining gender recognition, either through a fee, through time invested in complying with a bureaucratic process or through the cost of obtaining medical evidence or legal assistance raises another issue. If recognition of one's gender identity is to be regarded as a right<sup>1112</sup>, then one should recognise that the majority of the population is given access to that right almost automatically, as soon as their sex is assigned at birth. As such, any fee or

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<sup>1108</sup> New Zealand reduces 30-year wait for gender reassignment surgery, Eleanor Ainge Roy, 19/10/2018, Located at <https://www.theguardian.com/society/2018/oct/19/new-zealand-reduces-30-year-wait-for-gender-reassignment-surgery>, accessed 07/09/2019

<sup>1109</sup> LGBT in Britain Trans Report, Stonewall, 2017, Located at [https://www.stonewall.org.uk/system/files/lgbt\\_in\\_britain\\_-\\_trans\\_report\\_final.pdf](https://www.stonewall.org.uk/system/files/lgbt_in_britain_-_trans_report_final.pdf), accessed 09/01/2021, page 19

<sup>1110</sup> Jay v Secretary of State for Justice [2018] EWHC 2620 (Fam)

<sup>1111</sup> Intersex Treatment and the Promise of Trauma, Iain Morland, collected in Gender and the science of difference cultural politics of contemporary science and medicine, Jill A. Fisher Rutgers University Press, 2011

<sup>1112</sup> As per The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, International Commission of Jurists (ICJ), 10 November 2017

other cost of gender charges a fee for an essential right but only for a particular minority group. While such a fee may be defended by the idea that those who use a service should cover its cost, if one regards recognition as a right, then one can see that everyone receives the service, but only some are charged a fee. While it could be argued that that service being charged for is the managing of paperwork and evaluating of evidence and other requirements of the system, it should be noted that this system is optional, and could be replaced by one with a much lower cost for the state. Additionally the person who must use this process has not asked for the process to be bureaucratic, it is simply deemed that this process is the one they must undergo because of the circumstances of their birth. As such any defence of a fee on the ground that the service must be paid for must justify this against the discriminatory impact of any system which requires that one group must pay to access a right that others need not pay for, particularly when the group that must pay to access the right is also often disadvantaged in other ways.

### How does recognition behave in practice?

Some jurisdictions, appear to have had some difficulty reconciling the desire to recognise transgender identities with the existing law on marriage. A key example can be seen in the case of *the marriage of C*<sup>1113</sup>. This case quite clearly shows the core difficulty regarding marriage; that jurisdictions that define marriage as between one man and one woman de-facto exclude everyone who is neither a man nor a woman, such as those with non-binary genders, and those who cannot be easily classified as men or women, such as some intersex people. Legal systems have attempted a number of solutions to this issue.

In chronological order the first solution attempted was to decide that a person could not exist who could not be classified, so deciding the validity of a marriage involving such a person

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<sup>1113</sup> In the marriage of C and D (falsely called C) (1979) 35 FLR 340

was simply a matter of deciding “which sex predominates”<sup>1114</sup>. *Hall’s case* must be mentioned at this juncture, an early case in which it was decided that the individual in question could not be cleanly classified as a man or a woman, so aspects of the dress and conduct of men and women were merged to create a third distinct category to them<sup>1115</sup>.

Following this more modern legal solutions have been attempted. Following the conclusion in *the marriage of C*, which was seen to be unsatisfactory the court in *W v W* reached a conclusion somewhat similar to the approach of determining “which sex predominates”. In this case the court decided that that the gender in which a person actually lives their life should be decisive<sup>1116</sup>. In a way this can be seen to be similar to the approach of determining predominance, but rather than attempting to gauge biological predominance, it focuses on which gender / sex is predominant from a social perspective. This can be contrasted with cases addressing transgender people, which decided to focus on sex assigned at birth and biological characteristics<sup>1117</sup>. This contrast is particularly interesting in jurisdictions which in other aspects of the law focus more on a transgender persons social existence than their biological characteristics, such as in Scotland where how one lives in society determines where one will be housed if sent to prison<sup>1118</sup>, but where one requires a diagnosis of gender dysphoria, but not surgery to receive a gender recognition certificate<sup>1119</sup>. The result is a somewhat muddled approach, where transgender and intersex people are treated inconsistently, and transgender policy does not always appear to be consistent with itself.

There is another solution to the issue of marriage, which has been simply to replace the requirement for a man and a woman with a requirement that the participants be two competent consenting adults regardless of gender or sex. Such an approach has been taken in

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<sup>1114</sup> A Mechanical and Critical Enquiry into the Nature of Hermaphrodites, James Parsons, Sagwan Press, 1741

<sup>1115</sup> Impossible Hermaphrodites: Intersex in America, 1620–1960 Elizabeth Reis September 2005 The Journal of American History 411, Located at [http://pages.uoregon.edu/healarts/studies/alternatives/Alt%20PDFs/Hermaphrodites\\_Reis.pdf](http://pages.uoregon.edu/healarts/studies/alternatives/Alt%20PDFs/Hermaphrodites_Reis.pdf), page 419, paragraph 1

<sup>1116</sup> *W v W* (Physical Inter-Sex) [2001] Fam 111

<sup>1117</sup> *Corbett v Corbett* (Otherwise Ashley) [1971] P. 8

<sup>1118</sup> Scottish Prison Service Gender Identity and Gender Reassignment Policy, March 2014, Located at [http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562\\_1392.pdf](http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562_1392.pdf), accessed 05/11/2019

<sup>1119</sup> Gender Recognition Act 2004 Section 3

Australia<sup>1120</sup> and New Zealand<sup>1121</sup>. This appears to eliminate the issue of individuals who do not conform to a gender/ sex binary being excluded from the institution of marriage, but does require the community to have a more accepting attitude regarding gender and sexual orientation, so may not be viable at the moment in every jurisdiction.

The UK has taken a somewhat different approach. When the UK first introduced the Gender Recognition Act it was necessary to dissolve one's marriage in order to obtain recognition in order to avoid non-heterosexual marriages being possible de-facto<sup>1122</sup>. Following this the UK introduced civil partnerships, in order to allow homosexual couples to enter into a legal relationship akin to marriage. This introduced a level of complexity, as marriage was exclusively heterosexual and civil partnerships were exclusively homosexual. Following this Marriage (Same Sex Couples) Act extended the right to marry to same sex couples, which meant that it was possible for a person who changed their legal gender to remain in a valid marriage. The Gender Recognition Act was amended to include the measure referred to as the spousal veto, which replaced a previous measure which required a person seeking gender recognition to either dissolve their marriage or to convert it to a civil partnership<sup>1123</sup>. The issues regarding the spousal veto have been discussed previously<sup>1124</sup>. At the time of writing, even though same-sex marriage<sup>1125</sup> and heterosexual civil partnerships<sup>1126</sup> are possible in the UK, the spousal veto remains. As such due to the evolution of marriage in the UK occurring in a number of steps, with each step involving compromises, and leaving behind some of those compromises even when the half measure itself is replaced, the introduction of marriage equality in the UK can be said to not have fully extended to transgender people. While proponents of the spousal veto state that it is necessary as a transgender person coming out is an important juncture in a relationship which should prompt serious thought and require both parties to confirm that they are happy to continue with the relationship<sup>1127</sup>. This is manifested by interim gender recognition certificates, which do not provide gender

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<sup>1120</sup> Marriage Amendment (Definition and Religious Freedoms) Act 2017

<sup>1121</sup> Marriage (Definition of Marriage) Amendment Act 2013, Public Act 2013 No 20

<sup>1122</sup> Gender Recognition Act 2004 as originally enacted, Schedule 4.

<sup>1123</sup> Marriage (Same Sex Couples) Act 2013, Schedule 5, part 1

<sup>1124</sup> Discussed at page 154

<sup>1125</sup> Marriage (Same Sex Couples) Act 2013

<sup>1126</sup> Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019

<sup>1127</sup> Transgender equality, first report of the session 2015-2016 HC 390 House of commons Women and Equalities Committee, Published on 14 January 2016 located at <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, accessed 07/01/2021, paragraphs 55-57

recognition but render the applicant's marriage voidable. This allows for a person who finds themselves unexpectedly in a relationship with a person's whose gender is not what they thought it was to leave the marriage, which may be understandable for certain individuals. However the implementation whereby the cisgender partner can effectively withhold gender recognition from their partner seems to be a questionable means of achieving the stated objective.

It may be possible to address this concern through other methods, such as reform to the divorce system in the UK, which has historically not allowed for a "no fault" divorce<sup>1128</sup>. Reform of this which will allow people to leave marriages which they no longer wish to be in due to unexpected circumstances more easily in general is already in progress. The Women and Equalities Committee recently issued a call for evidence regarding transgender rights which specifically requested evidence on the possible removal of the spousal consent requirement<sup>1129</sup>. In 2020 legislation was introduced which removes the requirement for one of the previously required factual situations to be present, replacing it with a notice requirement<sup>1130</sup>. This has the effect of introducing "no fault" divorce to the UK, without the previously required 2 or 5 year separation requirements. This may make the elimination of the spousal veto more viable in the future.

## Overall analysis

Through the previous examination of the functioning of gender and sex recognition in the examined jurisdictions one can see a wide array of different approaches to the issue being

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<sup>1128</sup> The Matrimonial Causes Act 1973, Section 1 (2)

<sup>1129</sup> Call for evidence, Women and Equalities Committee, UK Parliament, Located at <https://committees.parliament.uk/call-for-evidence/291/reform-of-the-gender-recognition-act/>, accessed 09/11/2020

<sup>1130</sup> Divorce, Dissolution and Separation Act 2020

implemented in a variety of contexts. Further collection of data will be necessary to draw certain conclusions about these different approaches. For example there does not appear to currently be sufficient data to draw conclusions on the impacts of gender recognition via court applications vs application to a gender recognition panel. The availability of data in this area of study is somewhat poor in general. For example the UK had not conducted a national survey of the experiences of its transgender population until 2019<sup>1131</sup>. So, while outcomes on certain metrics cannot be compared comparisons are possible on other grounds. This thesis has focused on analysis and comparison of the legal regimes in terms of their foundations, the legal reasoning behind their implementation and possible implications of the decision making processes involved, with a particular focus on human rights. Based on this analysis this section will present a number of recommendations for those responsible for implementing gender recognition.

#### The process of recognition:

As with any legal measure, it is important to consider exactly what the purpose the recognition is being granted. As discussed previously recognition systems and criteria may differ within the same jurisdiction based on the purpose for which recognition is being granted<sup>1132</sup>. This has a number of advantages to a single unified approach and allows measures to be proportionate to the needs of the purpose in question, it is also the approach taken by all of the jurisdictions examined in this thesis to varying degrees. As such a recognition measure should be tailored for the purpose that it serves. This ensures that this is not unnecessarily restrictive and that the needs of the purpose are also satisfied. In addition to this it is important to be critical about what the needs of the purpose actually are. For example in England prisoners are generally housed according to the gender on their birth

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<sup>1131</sup> National LGBT Survey Research Report, Government Equalities Office 2018, Located at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/721704/LGBT-survey-research-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf), accessed 10/01/2021

<sup>1132</sup> Discussed on page 209



certificate<sup>1133</sup>, however in Scotland more emphasis is placed on how the individuals live their lives in practice<sup>1134</sup>. While it has been argued that with regards to prison's gender assigned at birth, or possessions of certain anatomical features should be decisive it is important that these decisions be based in a full understanding of the forces at work. There does not, at the time or writing, seem to be any evidence to suggest that measures in prisons based on lived identity increase rates of assaults in prison. Additionally, as stated in the 2016 PSI, the women's estate should be equipped to deal with such assaults, and measures put in place to protect prisoners from each other should not cease to function simply because a prisoner is transgender<sup>1135</sup>. As prisons are in many ways the most "extreme" situation in which gender recognition can become relevant this should serve as an example of how restrictions on gender recognition in some situations may seem superficially to be justified, but may not be necessary or justified in practice.

Additionally, it is important that in addition to being tailored for a specific purpose it may be useful to consider that it may be counterproductive to use gender as a shorthand for other characteristics. Having a single unified "legal gender" may run the risk of using this category as shorthand when actually more specific measures may be called for. This is because sex and gender categories contain so much diversity that they can be said to be "fatally imprecise"<sup>1136</sup>. For example, a public health initiative may wish to encourage screening for cervical cancer. If this is implemented by allocating funds for testing of "women" this may create a number of problems depending on how gender recognition is implemented. It may risk excluding trans men who may still need to be screened for cervical cancer or may force transgender women to out themselves as transgender when they are offered testing that does not apply to them. However such an initiative can be implemented without making reference to gender at all, by simply saying that those with a cervix are entitled to the testing. Being specific in this way can avoid a number of gender recognition complications, however it does

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<sup>1133</sup> The care and management of individuals who are transgender, HM Prisons and Probation Service, Ministry of Justice, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at 1.5

<sup>1134</sup> Scottish Prison Service Gender Identity and Gender Reassignment Policy, March 2014, Located at [http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562\\_1392.pdf](http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562_1392.pdf), accessed 05/11/2019

<sup>1135</sup> The care and management of individuals who are transgender, HM Prisons and Probation Service, Ministry of Justice, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at 6.2

<sup>1136</sup> Mutilating gender. Spade, D. (2006). In S. Stryker & S. Whittle (Eds.), *The transgender studies reader* (pp. 315–332). New York and London: Routledge.

require those implementing policy to be mindful of the exact requirements of the police and of the complexities of gender and sex. An example of this approach being implemented can be seen in Tasmania where legislation was amended to replace reference to gender or gendered roles with more generally applicable terms<sup>1137</sup>.

This specificity can be beneficial in ways more generally applicable than the transgender or intersex populations. Replacing the use of gender with reference to specifics can also contribute to reducing the emphasis on sex and gender in a legal system, without reducing access to legal rights, as those rights will still be available to those who need them, but gender will no longer be used as a shorthand to describe that category of persons. This, when combined with a willingness to be critical about when gender or sex are actually relevant to a situation may help prevent an injustice where rights are unjustly distributed due to a flawed system of categorization.

However it is important not to be too reductionist, while particular characteristics may be more useful than sex categories in the vast majority of situations, it is important to note that gender, as it is a social category, may be applicable in more situations, particularly when the issue at hand is related to interactions between members of society. For example in situations involving domestic abuse, gender categorization may be useful, although it is important not to ignore the existence of men who experience such abuse. Similarly with regards to bathrooms, any interaction in that space occurs at a social, not biological level. While concern has been expressed regarding the risk of impropriety from those with “male anatomy”<sup>1138</sup>, it is worth noting that such impropriety is already unlawful regardless of the sex of the perpetrator, as such the only situations in which sex may become relevant are already crimes, regardless of the sex of the perpetrator.

In situations where sex and gender categories are used, it is important that all those who policy makers anticipate to be included by a category are, in fact, included by the category. As such if a jurisdiction recognises that someone is entitled to be considered to be a member of a category, but must go through a process to be recognised as such it is important that this

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<sup>1137</sup> Discussed on page 58

<sup>1138</sup> The toilet debate: Stalling trans possibilities and defending ‘women’s protected spaces.’ Jones C, Slater J, *The Sociological Review*. 2020;68(4):834-851.

process contain as few barriers and be as easy to navigate as possible. So long as a situation continues where someone meets the relevant criteria, but is not recognised for practical reasons, such as lacking time or money, this person is de-facto being recognised as a member of the wrong category. This may mean for example that a transgender woman who cannot afford a fee for gender recognition, who otherwise meets all the relevant criteria, and thus is recognised by the state as being correctly categorised as a woman, remains incorrectly classified, which may carry a number of practical implications. As such it seems beneficial for recognition systems to have as few barriers to access as possible. This is also necessary from a human rights perspective, as gender recognition has been recognised as an essential part of a person's human rights, and thus should be readily accessible to them. From a practical perspective this may mean ensuring that standard forms are provided, as well as clear guidance to make the process as simple as possible. Additionally removing fees would result in access to this right no longer being limited based on financial means.

In addition to reducing barriers to access to those who are otherwise eligible for recognition, policy makers should also be willing to examine the degree to which restrictions on eligibility are justified. Restrictions based on age or marital status may well be based on concerns which can be more proportionately remedied through other means or which may not be based in sound evidence.

#### Practical implications:

Practical implications of various recognition systems will be examined in two parts, first examining the practical implications of gender / sex recognition in general, then examining the particular implications of gender recognition for non-binary and intersex people.

When discussing the practical concerns a few key issues are particularly relevant. What do gender recognition systems look like in practice, and what features allow them to function in such a way that they provide the necessary recognition to those who are eligible?

As described in *Corbett v Corbett*<sup>1139</sup> and discussed previously, situations in which gender is relevant in the law can be divided into situations where gender is essential and situations where it is relevant but not essential<sup>1140</sup>. The Gender Recognition Act in the UK can serve as an example of how the two situations related to each other. In most situations where gender is relevant but not essential, the participants are free to agree whatever criteria they wish for gender recognition. For example a bank is free to set any criteria it pleases<sup>1141</sup> for amending the gender listed on its customer records. This extends to the vast majority of situations where gender or sex are involved, including passports and national insurance. As mentioned when addressing the case in more detail, sex was only deemed essential in a few situations, and in most of these situations the law has since changed<sup>1142</sup>.

It is worth noting that while gender recognition in these situations can be characterised as a negotiation, like many negotiations there is a significant imbalance of power between the parties.

The party seeking recognition is always at somewhat of a disadvantage. This is because while it may be thought of as a negotiation, it is somewhat different to other negotiations. Rather than negotiating the exchange of one thing of value for another, the person seeking recognition is seeking a thing of value, but the thing they give in exchange is somewhat more abstract. While a fee may be paid, this fee is normally not so much the price for recognition as an administration fee. Instead the price of recognition is normally some degree of conformity with the ideas about gender possessed by the recognising agent. For example in jurisdictions with laws requiring surgery for those seeking gender recognition such surgery is the price of recognition. Similarly if one wishes to change one's account details at their bank and the manager of the bank believes that trans people should only receive gender recognition if they conform to certain gendered norms, it is the manager's views of gender that must be negotiated with. This results in a situation where the "opposing force" in this sort of

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<sup>1139</sup> *Corbett v Corbett (Otherwise Ashley)* [1971] P. 8

<sup>1140</sup> That judgement referred to sex, however the same reasoning can apply to both gender and sex and appears to reflect practice in relevant jurisdictions.

<sup>1141</sup> Subject to anti-discrimination legislation

<sup>1142</sup> Discussed on page 124

negotiation is the views of the individual on gender, which are shaped by the views of the society on gender and what is acceptable regarding gender recognition. This poses some particular difficulties, but also may suggest a number of possible avenues for reform which would not be otherwise possible.

The fact that one must negotiate against individual and social ideas about gender means that without antidiscrimination legislation that interactions relating to this sort of gender recognition can be particularly vulnerable to individual malice on the part of those who choose not to grant recognition, as well as individual essentialist views. However if anti-discrimination legislation is present in the jurisdiction this can have a number of positive effects. Not only can help provide people a remedy against denial of recognition which results in unjust harm, but it may also assist those seeking recognition by reframing the negotiation. A common assertion by those who believe that transgender identities should not be recognised is that it is simply a matter of objective biology, and only those who meet specific objective biological criteria should be recognised as belonging to one gender/sex or the other. This can result in a somewhat inflexible negotiating partner, as in many cases a trans person will never be able to satisfy these criteria. However anti-discrimination legislation can help to reframe the issue. It does this by framing situations where a person's gender may be recognised not as a case of rights being attached to inflexible criteria, but as being a matter of fairness. As such the question changes from "does this person possess the anatomy required to be seen as a woman" to "is it unfair for this person to be treated differently from a cisgender woman". This does not grant blanket recognition, for example in the UK there are exceptions in which a transgender person may be treated differently if to do so is a proportionate means to achieve a legitimate aim. However an anti-discrimination law of this kind almost by necessity can introduce some measure of flexibility into otherwise inflexible "negotiating positions" regarding gender recognition, as well as fulfilling its primary objective of preventing harmful discriminatory treatment.

In addition to anti-discrimination legislation, other legal measures may impact how recognition functions in those situations where gender and sex are relevant but not essential. Gender recognition legislation, such as the Gender Recognition Act in the UK can also play a

key role. Such legislation, using language such as the “for all purposes”<sup>1143</sup> language in the GRA impacts all forms of recognition, not only those for which a recognition certificate is required, such as changing sex on a birth certificate. As such, while the criteria for recognition used when gender is relevant but not essential are negotiable before a person is given a recognition certificate, the certificate renders their legal gender absolute<sup>1144</sup> for all purposes, rendering negotiation impossible. This means that while gender recognition for the vast majority of purposes is negotiable, recognition legislation creates a guarantee that even a party disposed to deny recognition they must recognise a person’s gender if the statutory requirements are met. This can function as a “safety valve” of sorts, allowing a person’s gender to be recognised if they meet certain criteria regardless of the beliefs of the recognising party, thus reducing the extent to which a person seeking recognition is at the mercy of social norms and beliefs. This can allow a society to improve access to gender recognition even if transphobic or otherwise ignorant views are still commonplace within their culture. However it is worth being aware that the effectiveness of gender recognition legislation may be limited in such situations, as people may be afraid to ask for gender recognition if they perceive that doing so may put them in danger of transphobic abuse or violence<sup>1145</sup>. An example of this in practice can be found in the case of schools. It has been pointed out that single sex schools, when making decisions regarding admitting persons of differing gender identities, tend to use legislation as a baseline, but make practical decisions on a more discretionary basis, without formal rulemaking<sup>1146</sup>. This shows both how anti-discrimination legislation can be vital in shaping recognition practices, but also how legislation can set norms beyond the specific measures contained within it, and form a basis for more individualised judgements.

Gender recognition legislation can also be important as it facilitates the ability to disappear. As discussed previously, this is a key function of gender recognition legislation, with a number of justifications discussed in the ECHR caselaw, mostly related to protecting transgender people from possible discrimination and violence if they are outed by their

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<sup>1143</sup> Gender Recognition Act 2004, Section 9

<sup>1144</sup> Apart from exceptions, such as those found in the Equality Act 2010

<sup>1145</sup> See the difficulties associated with coming out under stigma reported in Report of the Expert Committee on Issues Relating to Transgender Persons, located at [socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf](http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf), accessed 28/12/20, page 47

<sup>1146</sup> The challenge of same sex provision: How many girls does a girls’ school need?, Renz, F. (2020),10(2) *feminists@law*, page 17

identity documents. Without such legislation, while a person may be able to negotiate recognition for specific purposes, even to have their birth certificate changed, it may not be possible to obtain the uniformity of identity which would allow a person's transgender history to disappear. Without gender recognition "for all purposes" there is always a risk that one important document may remain unchangeable and reveal a person's gender assigned at birth.

As with any piece of legislation, public education is important for the successful implementation of gender recognition legislation. This is particularly the case for gender recognition legislation as it fundamentally relates to how a minority population should be treated, particularly a minority which most people may not be particularly knowledgeable about, and such lack of knowledge can have a profound negative impact on how a person acts. As such it is important that the rationale for the legislation be clearly explained and that the population are aware of how the legislation works, to ensure that they understand their obligations with regards to gender recognition. An example of this can be seen in the UK, where a review in 2016 found that a lack of public understanding regarding gender recognition and non-discrimination legislation had led to a number of organisations refusing to recognise a person's gender due to believing that no gender recognition could be done for any purpose before a person had received a gender recognition certificate<sup>1147</sup>. This shows how without sufficient public education the role of recognition legislation can be misunderstood, and used as a requirement for all recognition rather than as a guarantee of recognition if certain criteria are met.

As discussed previously, gender recognition legislation can facilitate both being seen and disappearing<sup>1148</sup>. Being seen allows a person to be perceived by society and official systems according to how they identify. This can make a number of services and spaces more

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<sup>1147</sup> Transgender equality, first report of the session 2015-2016 HC 390, House of Commons Women and Equalities Committee, Published on 14 January 2016 located at <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, accessed 07/01/2021, paragraph 143

<sup>1148</sup> See page 199

assessable and less alienating, as well as having a number of mental health benefits<sup>1149</sup>. The ability to disappear allows a transgender person to become, in terms of documentation of their gender, indistinguishable from a cisgender person. The importance of this was emphasised in *Goodwin v UK*<sup>1150</sup>, where it was discussed how vital it can be to have a uniform legal gender to avoid discrimination or being outed as a transgender person against one's will. Without both of these elements a gender recognition system cannot be considered to be complete.

A system that does not grant the ability to be seen, in many ways defeats the purpose of a gender recognition system, as it denies people the right to be recognised. Rather than being totally lacking it appears to be more common for systems to restrict the right to be seen rather than to totally eliminate the right to be seen. For example many jurisdictions restrict the right to be seen by only granting recognition to binary genders or those of a certain age or marital status. Evidential requirements appear to be the most common restriction on the right to be seen, as they are overtly restrictions on recognition designed to recognise only those deemed worthy of recognition. A more specific example can be found in India, where the right to be seen is restricted by requiring surgery for a person to be recognised as having a binary gender<sup>1151</sup>, a practice which has been condemned by a number of organisations including the UN<sup>1152</sup> and the ECHR<sup>1153</sup>. Until the individual is able to get surgery they are only able to be registered as a transgender person. As a result of this a person can be seen, but can only be seen as transgender, not necessarily as their personal gender identity. Gender recognition systems which function in this way can serve as a reminder that when examining the right to be seen respecting the autonomy of the individual is crucial, as a person should be recognised

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<sup>1149</sup> Legal gender marker and name change is associated with lower negative emotional response to gender-based mistreatment and improve mental health outcomes among trans populations, Arjee Restar, Harry Jin, Aaron Breslow, Sari L. Reisner, Matthew Mimiaga, Sean Cahill, Jaclyn M.W.Hughto, *SSM - Population Health* 11 (2020) 100595, Located at

<https://www.sciencedirect.com/science/article/pii/S2352827320302329?via%3Dihub>, accessed 08/01/2021

<sup>1150</sup> *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18, Paragraph 77

<sup>1151</sup> The Transgender Persons (Protection of Rights) Act 2019 No 40 of 2019

<sup>1152</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, United Nations General Assembly, Human Rights Council, Twenty-second session, February 2013, Located at

[https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf), accessed 09/01/2021

<sup>1153</sup> *A.P., Garçon and Nicot v France* applications 79885/12, 52471/13 and 52596/13 text located at <http://hudoc.echr.coe.int/eng?i=001-172913> accessed 21/07/2018, and *X and Y v Romania*, Applications - 2145/16 and 20607/16



as their authentic identity, rather than the identity imposed upon them by the categorisation system<sup>1154</sup>.

A system that does not grant the ability to disappear may grant gender recognition in some form, but does not provide gender recognition that applies in all areas of life and may leave a “paper trail” that allows a person to be identified as being transgender. An example can be seen in the Tasmanian law which, prior to the 2019 Justice and Related Legislation (Marriage and Gender Amendments) Act required that after a person’s birth certificate was changed that a record be kept noting that a person was previously registered as another sex<sup>1155</sup>. In addition to making a note that a person is trans a gender recognition system can fail to allow a person “total” gender recognition. An example of this can be seen in the UK prior to the Gender Recognition Act, where while it was possible for one gender to be recognised in individual situations through negotiation there was no universal recognition, which necessitated the cases leading to *Goodwin v UK*.

In addition to the analysis within this work, the importance of ensuring that gender recognition systems enable both being seen and “disappearing” is also discussed in the recent EU gender recognition report<sup>1156</sup> which states that member states should:

“Take all necessary measures to ‘ensure that procedures exist whereby all State issued identity papers which indicate a person’s gender/sex — including birth certificates, passports,

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<sup>1154</sup> See Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, International Commission of Jurists (ICJ), March 2007, Located at: <https://www.refworld.org/docid/48244e602.html>, accessed 13/08/2020, principle 3 and The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, International Commission of Jurists (ICJ), 10 November 2017, Located at: <https://www.refworld.org/docid/5c5d4e2e4.html>, accessed 13/09 2020, principle 31

<sup>1155</sup> Births, Deaths and Marriages Registration Act 1999, Version from 1 July 2010 – present, Section 28D Located at <https://www.legislation.tas.gov.au/view/html/inforce/current/act-1999-058>, accessed 23/08/2019

<sup>1156</sup> Legal gender recognition in the EU, The journeys of trans people towards full equality, European Commission, Located at [https://ec.europa.eu/info/sites/info/files/legal\\_gender\\_recognition\\_in\\_the\\_eu\\_the\\_journeys\\_of\\_trans\\_people\\_towards\\_full\\_equality\\_web.pdf](https://ec.europa.eu/info/sites/info/files/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_web.pdf), accessed 14/08/2020

electoral records and other documents — reflect the person’s profound self-defined gender identity’.”<sup>1157</sup>

And

“Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy’.”<sup>1158</sup>

### The functioning of legal gender recognition as it relates to non-binary people.

As with any recognition of non-binary identities one of the concerns raised regarding such recognition is primarily what will these categories mean in practice. Gender recognition often has practical consequences, and it is not immediately clear what the consequences of having a passport marked “X”, or any other identity document with a non-binary gender or sex descriptor would or should be. The most simple answer to this is that the consequences are what we decide they are. This response is correct, as the relevant legal systems can be modified to adjust the consequences to whatever is desired, but may not be particularly useful in assisting someone deciding how they should implement a gender recognition system. The question remains: if a non-binary category is recognised, what should this mean in practice? The answer depends on the purposes of gender recognition. As discussed previously, there is tension in the case law and activism on the topic is that gender recognition can serve two seemingly conflicting purposes, to enable a person to be seen and to enable a person to

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<sup>1157</sup> Legal gender recognition in the EU, The journeys of trans people towards full equality, European Commission, Located at [https://ec.europa.eu/info/sites/info/files/legal\\_gender\\_recognition\\_in\\_the\\_eu\\_the\\_journeys\\_of\\_trans\\_people\\_towards\\_full\\_equality\\_web.pdf](https://ec.europa.eu/info/sites/info/files/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_web.pdf), accessed 14/08/2020, page 15

<sup>1158</sup> Legal gender recognition in the EU, The journeys of trans people towards full equality, European Commission, Located at [https://ec.europa.eu/info/sites/info/files/legal\\_gender\\_recognition\\_in\\_the\\_eu\\_the\\_journeys\\_of\\_trans\\_people\\_towards\\_full\\_equality\\_web.pdf](https://ec.europa.eu/info/sites/info/files/legal_gender_recognition_in_the_eu_the_journeys_of_trans_people_towards_full_equality_web.pdf), accessed 14/08/2020, page 16

disappear to avoid discrimination<sup>1159</sup>. Non-binary recognition enables a person to be seen. This can have a number of benefits including allowing a person to be treated according to their identity, which may improve their access to services and have mental health benefits<sup>1160</sup>. Recognition of a non-binary gender cannot, at this point, provide the ability to “disappear”, as a person recognised as non-binary cannot be indistinguishable from a cisgender person in a society which only assigns male and female genders at birth. This form of recognition cannot allow a person to evade discrimination by being perceived to be cisgender. However, in both the case of binary and non-binary individuals gender recognition can, depending on the rules of the jurisdiction make an aspect of their “history” disappear: their gender assigned at birth. While someone recognised as non-binary can be deduced to be transgender, it would not necessarily be possible to determine their sex assigned at birth, which may be useful or psychologically beneficial to the individual. While this form of recognition cannot allow a person to be indistinguishable from a cisgender person, it can still serve the useful functions of “being seen” which recognition serves for binary transgender people.

Because non-binary genders are not assigned at birth the issue of what legal rights are attached to the status becomes somewhat different. Because the status will always be optional it may be sufficient to create the legal status simply to allow people to be seen, to then prohibit discrimination against those who identify as such, and then to allow society to develop an understanding on what this category should mean in practice. This is in many ways already happening, as the jurisdictions examined that recognise non-binary genders do not tend to have rules within their prison system to deal with this. Although few policies mention non-binary or intersex identities specifically, those that do demonstrate a variety of approaches. New Zealand’s policy does not refer to non-binary identity, but with regards to those who have intersex birth certificates the decision must be made on a case by case basis by the relevant minister, with no guidance given as to how this choice is made<sup>1161</sup>. Kerala makes use of a separate facility for transgender people including those with non-binary

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<sup>1159</sup> Discussed at page 235

<sup>1160</sup> Legal gender marker and name change is associated with lower negative emotional response to gender-based mistreatment and improve mental health outcomes among trans populations, Arjee Restar, Harry Jin, Aaron Breslow, Sari L. Reisner, Matthew Mimiaga, Sean Cahill, Jaclyn M.W.Hughto, SSM - Population Health 11 (2020) 100595, Located at

<https://www.sciencedirect.com/science/article/pii/S2352827320302329?via%3Dihub>, accessed 08/01/2021

<sup>1161</sup> See page 37

identities<sup>1162</sup>. The UK mentions non-binary people but does not make any special accommodation for them, instead stating that they will be used according to their legal gender and categorizes non-binary genders alongside those who do not have sufficient evidence or intention of transitioning to the “opposite gender assigned at birth” as having limited evidence of living in the gender which they identify as<sup>1163</sup>. The Scottish prison service mentions non-binary people<sup>1164</sup> in its policy, but while its policy in general places more emphasis on autonomy rather than biological determinations by housing people according to the gender in which they live, this does not necessarily extend to non-binary people. The policy refers to intersex and non-binary people as “non-reassigned trans people”<sup>1165</sup>. And there are no other mentions or provisions for their accommodation, as such this suggests that it considers those not fully transitioning to a binary gender to be “non reassigned” and thus not qualifying for housing other than that allocated on the basis of sex assigned at birth.

There is also the category of jurisdictions which do not have specific rules for those who identify as non-binary or intersex, but which have general rules that can be easily applied to them. For example Victoria considers a number of factors, including where a person believes they would best be housed<sup>1166</sup>. While these jurisdictions may not have a “non-binary estate” akin to the male and female estates, they can still formulate general rules on where a person should be housed, such as allowing the non-binary person to choose, subject to safety considerations. These jurisdictions may provide another possible model for addressing the gender recognition needs of non-binary and intersex persons.

Conceptualizing non-binary and intersex identities as single identities, as a “third category” fails to recognise the inherent diversity of characteristics and identities of those within these categories. Any way of defining either how this category behaves or how to tell which individuals should fall within it risks being reductionist, based on a flawed understanding of sex, gender, transition and identities and failing to meet the needs of individuals. Similarly creating “third category” prisons or wings for all transgender people not only risks treating all

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<sup>1162</sup> See page 117

<sup>1163</sup> Ministry of Justice, HM Prisons and Probation Service, *The care and management of individuals who are transgender*, Published 22 July 2019, Located at <https://www.gov.uk/government/publications/the-care-and-management-of-individuals-who-are-transgender>, accessed 03/11/2019 at page 32

<sup>1164</sup> Scottish Prison Service Gender Identity and Gender Reassignment Policy, March 2014, Located at [http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562\\_1392.pdf](http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562_1392.pdf), page 9 accessed 05/11/2019

<sup>1165</sup> Scottish Prison Service Gender Identity and Gender Reassignment Policy, March 2014, Located at [http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562\\_1392.pdf](http://www.sps.gov.uk/nmsruntime/saveasdialog.aspx?fileName=SPSGenderIdentityandGenderReassignmentPolicy20142562_1392.pdf), page 9 accessed 05/11/2019

<sup>1166</sup> See page 74

trans people as a monolith but also perpetuates the idea that trans men and women are something other than their own genders, separate from cis people in a way that warrants differential treatment based solely on their transgender status. Examples of this can be seen in the UK and India. The UK chooses to classify non-binary persons as “non-reassigned” or chooses to only recognise those with a binary gender as having housing needs that may need more than is available using voluntary agreements. This appears to be due to a commitment to a binary model of sex and gender. Because the system only acknowledges accommodations for men and women, non-binary and intersex people must be classified in that system, normally according to sex assigned at birth. Kerala in India has instead chosen to adopt a model which classifies transgender prisoners as a separate third gender category, which risks erasing the needs and identities of those with binary gender identities, as well as the diversity inherent in non-binary and intersex identities.

Because of this it may be the case that the model used in Victoria may be more useful and do a better job at protecting the rights of transgender and intersex people. The built in respect for autonomy present in taking where an individual wishes to be housed into account means that the system is not refusing to acknowledge a person’s identity, even if the accommodations available may not feature a category that precisely matches their own gender identity. It may be the case that so long as general principles such as autonomy, safety and non-discrimination are observed, it may be sufficient to create the category first, and then allow society to decide the legal meaning of that category. This would mean that a person would be recognised as non-binary, allowing them to access the benefits of being seen as their own gender identity. It would then be up to individual recognising agents to decide how a non-binary person should be treated. In a number of ways this is already the case even in jurisdictions that do not have legislation regarding non-binary identities. This is because people already identify as having non-binary gender identities, and various bodies such as banks, universities, medical institutions, sports bodies and prisons must decide how these people should be treated, with many organisations, including public bodies, already recognising non-binary identities in various respects, and perceiving this recognition as being vital to their core mission<sup>1167</sup>. This is rendered somewhat complicated as this may involve fairly complex decisions and the ability and information to make these decisions is not necessarily possessed by those in a position to make them. As noted in the UK, gender recognition is often misunderstood,

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<sup>1167</sup> Taking Public Responsibility for Gender: When Personal Identity and Institutional Feminist Politics Meet, Cooper, D. (2020), *feminists@law*, 10(2), page 16

which can result in individual agents being reluctant to recognise gender without a recognition certificate<sup>1168</sup>, which does not allow for the recognition of non-binary people and may thus result in people being misgendered by those under the misapprehension that they are legally obliged to do so. As such legal clarity may be desirable to ensure that those responsible for gender recognition in the “relevant but not essential category” are aware of the existence of non-binary identities and the options available to them regarding recognition. This could be done through informational campaigns without changing existing laws, however for reasons previously discussed the formal addition of the category into legislation, particularly that regarding identity documents, may be desirable<sup>1169</sup>.

At the present moment non-binary gender identity appears to be treated as a category of exclusion. This means that being non-binary does not grant one special “non-binary rights”, such as the right to enter non-binary only restrooms, but it means that one does not wish to be treated as a man or a woman. Because non-binary is such a broad category, it seems unlikely that non-binary will ever be a “third gender” with its own restrooms etc. Current practice does not seem to be proceeding in that direction. Rather than toilets reserved for those who identify as non-binary it is becoming increasingly common to see gender neutral toilets, that may be used regardless of gender in addition to men’s and women’s toilets<sup>1170</sup>.

What may be more likely is a form of de-emphasising the role of sex or gender, sometimes referred to as de-gendering. De-gendering has been discussed as a means by which laws cease to regard gender as a matter of relevance, which may result in improved equality and inclusion of non-binary identities, as these identities would not have legal relevance, so would only provide the benefits of “being seen”<sup>1171</sup>. This has been described as a positive option, as it provides “an alternative to the proliferation of categories”<sup>1172</sup>. Some have

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<sup>1168</sup> Transgender equality, first report of the session 2015-2016 HC 390, House of Commons Women and Equalities Committee, Published on 14 January 2016 Located at <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>, accessed 07/01/2021, paragraph 143

<sup>1169</sup> See page 238

<sup>1170</sup> For an interesting example of this see the Stalled! Project at Stalled! Projects, Design, Located at <https://www.stalled.online/design>, accessed 10/01/2021 and Stalled!: Transforming Public Restrooms, Joel Sanders, Footprint: Delft Architecture Theory Journal. Issue 21. Delft: December 23, 2017.

<sup>1171</sup> No Man's Land': Non-binary Sex Identification in Australian Law and Policy, Theodore Bennett ,[2014] UNSWLawJl 31; (2014) 37(3) UNSW Law Journal 847

<sup>1172</sup> Genders that Don't Matter: Non-Binary People and the Gender Recognition Act 2004, Flora Renz, Published as a part of The Queer Outside in Law : Recognising LGBTIQ People in the United Kingdom, Senthurun Raj, Peter Dunne (eds), Palgrave Macmillan 2020, page 150

expressed concern regarding de-gendering, as they regard it as a threat to the ability of the law to protect those with specific genders, usually women<sup>1173</sup>. It has been pointed out that detaching gender status from law will not necessarily result in a more equal future, as it runs the risk of covering up existing discrimination by relying on the idea of formal equality rather than addressing systemic inequalities<sup>1174</sup>. However, de-gendering needs not be a process which removes any rights, but which detaches those rights from gender<sup>1175</sup>. For example, in Tasmania when introducing a gender recognition system permitting non-binary gender legislation was introduced which changed a number of other pieces of legislation to remove references to gender and replace them with more specific terminology. For example, the non-gendered word “parent” is added to the Adoption Act 1988 which referred to “mother and father”<sup>1176</sup>. As such the rights are not removed, but can exist detached from gender. Additionally it has been pointed out that important functions for measuring discrimination or injustice so that it can be eliminated do not necessarily require legal involvement in gender, as such monitory efforts like surveys have never required a particular legal status and can be done on the basis of self-declaration and careful question design<sup>1177</sup>. When recognising non-binary identities, due to the diversity inherent in the category it appears less likely that that it will become a category akin to the binary identities, but will rather necessitate a degree of de-gendering, in order to ensure that people can still access relevant legal rights but still be recognised as their authentic identity. This of course raises practical issues, particularly with regards to specifically how legislation can be written to accommodate such a diversity of identities. One possible solution is gender neutral drafting, which can take a number of forms. New Zealand for example uses the gender-neutral pronoun *ia*, which can mean him, she, they or it, in the Māori Language Act<sup>1178</sup>. The gender-neutral pronoun “they” may be used in English, but this raises some issues regarding reluctance to use the singular they for fear of

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<sup>1173</sup> Diversifying, Abolishing, Equalising Gender... Can the Law Do All Three?, Davina Cooper, *The Future of Legal Gender*, August 2018, Located at <https://futureoflegalgender.kcl.ac.uk/2018/08/22/diversifying-abolishing-equalising-gender-can-the-law-do-all-three/#more-378>, accessed 10/01/2021

<sup>1174</sup> *Genders that Don't Matter: Non-Binary People and the Gender Recognition Act 2004*, Flora Renz, Published as a part of *The Queer Outside in Law : Recognising LGBTIQ People in the United Kingdom*, Senthoran Raj, Peter Dunne (eds), Palgrave Macmillan 2020, page 150

<sup>1175</sup> Abolishing gender registration: A feminist defense. Braunschweig, L, (2020) 1 *International Journal of Gender, Sexuality and Law* 76

<sup>1176</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019, Located at <https://www.legislation.tas.gov.au/view/html/asmade/act-2019-007>, accessed 23/08/2019, Section 6

<sup>1177</sup> Abolishing gender registration: A feminist defense. Braunschweig, L, (2020) 1 *International Journal of Gender, Sexuality and Law* 76, Page 93

<sup>1178</sup> Te Ture mōTe Reo Māori 2016/the Māori Language Act 2016

being confusing or “grammatically incorrect”<sup>1179</sup>. While these issues will need to be addressed, there are a multitude of ways in which this could happen, which can be explored and examined on their own merits but are beyond the scope of this thesis<sup>1180</sup>.

To be clear, the “de gendering” discussed here is not the same as decertification of gender. While decertification involves the law ceasing to regulate gender in any form, de-gendering would involve laws being created in such a way that they no longer distinguish on the basis of gender, but rather on whatever basis is necessary, be that specific anatomy or a specific circumstance, such as having given birth to a child. This is sometimes referred to as “soft decertification”<sup>1181</sup>. A commonly raised concern regarding decertification is that it may do nothing to remedy inequalities while rendering institutional inequality invisible, with one person interviewed by the future of legal gender project commenting that:

“It's like taking a number plate off a car and saying you have changed the car. You haven't changed the car and the car is still a car. That is not going to deal with pollution, is it?”<sup>1182</sup>.

The process of rendering laws as gender neutral as possible allows laws to function with minimal confusion and complexity, while providing the benefits of having one's gender recognised, while also allowing time for such inequalities to be addressed prior to any true decertification, should that be desired in the jurisdiction. In this way it avoids the issue of merely “changing the numberplate”, but rather allows for systemic issues to be addressed in an environment of mutual respect, self-determination and equality prior to any future potential decertification.

While one cannot fully describe the practical implications of a non-binary gender, one can see from this discussion the direction in which it is likely to go, which can result in respect for the rights and identities of all people, provided that core principles of non-discrimination and autonomy are abided by.

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<sup>1179</sup> Gender Inclusive Legislative Drafting in English: A Drafter's Response to Emily Grabham, Xanthaki, H. (2020), *feminists@law*, 10(2), page 9

<sup>1180</sup> See an interesting discussion of this issue in *Exploring the Textual Alchemy of Legal Gender: Experimental Statutes and the Message in the Medium*, Grabham, E. (2020), *feminists@law*, 10(2).

<sup>1181</sup> *Taking Public Responsibility for Gender: When Personal Identity and Institutional Feminist Politics Meet*, Cooper, D. (2020), *feminists@law*, 10(2).

<sup>1182</sup> *Pulling the Thread of Decertification: What Challenges are Raised by the Proposal to Reform Legal Gender Status?*, Cooper, D., & Emerton, R. (2020), *feminists@law*, 10(2), page 7



Non-discrimination appears to be of particular importance in the case of non-binary people and those who wish to be recognised as intersex. This is because a person recognised as such will be able to be “seen” and correctly identified, but will not be able to “disappear” which has historically been one of the purposes of gender recognition legislation in order to protect against the harms of being exposed as being transgender. However, becoming legally indistinguishable from a cisgender person is not the only way a person may be protected from the harms of being known to be transgender in a society where the social / legal conditions exist in which discrimination or other poor treatment is possible or even likely to occur. The principle of non-discrimination and non-discrimination legislation can play a key role in ensuring that people can be “seen” without needing to disappear to avoid poor treatment. This can be particularly useful in situations where gender is relevant but not essential, which are not usually governed by gender recognition legislation, which make up most of the situations legal which involve gender on a day to day basis

The nature of most gender recognition as occurring in the category where gender is relevant but not essential does minimize the usefulness of legislation such as the GRA. However, this does not mean that legislation is irrelevant. The negotiations which characterise this category of legal interactions are regulated in a number of ways, but with regards to gender identity the most important way can be through their interaction with non-discrimination legislation. While notionally in this category of situations the recognising agent is free to set whatever criteria they wish for recognition. In practice this is limited by non-discrimination legislation. For example the owner of a business which provides bathrooms is free to decide who they will recognise as a man and who they will recognise as a woman in order to use these facilities. However, if they set these criteria in such a way that they disadvantage or cause harm to those possessing a protected characteristic they may run afoul of non-discrimination legislation. While not all jurisdictions have such legislation, a more concrete example can be seen in the UK. In the UK transgender people are protected by the Equality Act under the protected characteristic of gender reassignment<sup>1183</sup>. Because of this while a provider of a gendered facility, for example changing rooms, may choose whatever criteria they wish to recognise the gender of users of the facility, they must not use discriminatory criteria. Because the Equality Act prohibits direct and indirect forms of discrimination a service

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<sup>1183</sup> Equality Act 2010 Section 7

provider must avoid creating general rules which disproportionately disadvantage those with a characteristic less favourably as well as directly treating those with the characteristic less favourably<sup>1184</sup>. The provider must justify any choice which would exclude transgender people from being treated in accordance with their identity as being proportionate to a legitimate aim<sup>1185</sup>. The Code of Practice for the Equality Act explicitly uses changing rooms as an example, explaining that rules which treat transgender people differently from their gender identity will not be valid if the “legitimate aim” of these rules can be met in other ways. In the case of changing rooms the example explains that curtains and barriers can be sufficient to ensure the decency of all users without excluding transgender individuals<sup>1186</sup>. As such one can see the impact of non-discrimination legislation on everyday gender recognition. Non-discrimination legislation can also be seen as a vital accompaniment to any legislative attempt to protect intersex people, which, combined with protections of bodily integrity, can improve people’s lives and also assist in destabilizing binary notions of sex at a social level<sup>1187</sup>.

As mentioned previously solutions similar to those in Halls case, of creating a third category, may not be desirable due to intersex being such a diverse category in of itself. Additionally many intersex people do not desire to be recognised as a third category, as it can be inherently othering and perpetuate the idea that intersex people are fundamentally “other”, an idea which has contributed to the mistreatment of and stigma surrounding intersex people<sup>1188</sup>. Likewise solutions which rely on determining predominance may find themselves in difficulty due to the inherent difficulties of that task<sup>1189</sup>. Attempting to allocate a gender / sex based on predominance also fundamentally undermine individual agency and cannot be applied to non-binary people, such a solution will also necessarily be costly, as it will require the use of medical witnesses. Systems based on how a person lives their life in practice

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<sup>1184</sup> Equality Act 2010 Sections 13 and 19

<sup>1185</sup> This justification is possible due to Section 19(d) for indirect discrimination, and due to exceptions for particular situations such as the provision of single sex facilities as per schedule 3 para 28

<sup>1186</sup> Equality Act Code of Practice, Services, public functions and associations, Equality and Human Rights Commission, Located at [https://www.equalityhumanrights.com/sites/default/files/servicescode\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf), accessed 17/01/2021, page 198

<sup>1187</sup> Legislating Intersex Equality: Building the Resilience of Intersex People through Law, Garland, F and Travis, M (2018). *Legal Studies*, 38 (4). pp. 587-606.

<sup>1188</sup> Queering the Queer/Non-Queer Binary: Problematising the "I" in LGBTI+, Fae Garland and Mitchell Travis, Published in *The Queer Outside in Law : Recognising LGBTIQ People in the United Kingdom*, Senthoran Raj, Peter Dunne (eds), Palgrave Macmillan 2020, page 175

<sup>1189</sup> See *Sexing the Body: Gender Politics and the Construction of Sexuality*, Fausto-Sterling, Anne. New York, NY: Basic Books, 2000.

appear to be much more viable. This is particularly the case given that the result of recognition is necessarily social. A system based on biological characteristics will impact a great number of social interactions where those physical characteristics are wholly irrelevant. A person's genitals or ability to reproduce matter in very few situations, and those situations may be better regulated by direct reference to those characteristics rather than to the broad category which may not always include those who ought to be included. As such it appears that solutions relating to how a person lives their life in practice and self-declaration appear to be among the best available options. As mentioned previously, if implemented correctly this could result in one system capable of recognising the gender identities of both transgender and intersex people, regardless of gender identity, and affording them the opportunity to marry the person of their choice, a right which ought to be afforded regardless of sex or gender identity<sup>1190</sup>. Such a system will, of course, rely heavily on anti-discrimination legislation, however if sufficiently robust legislation is in place it may well be the case that it produces better outcomes than any system requiring mandatory classification<sup>1191</sup>.

This is only possible where as much as possible the law is "genderblind", this is particularly notable with regards to marriage, as can be seen in the case of the marriage of C<sup>1192</sup>. As such, even if a jurisdiction does not want to pursue a similar gender recognition system to that used in Tasmania, certain measures, such as removing gender requirements from marriage can be regarded as essential for allowing a system including gender recognition to function as smoothly as possible. While it is possible to have gender recognition without marriage equality, this can dramatically increase the complexity of the system, and thus its accessibility, as can be seen in the UK<sup>1193</sup>.

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<sup>1190</sup> Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity, International Commission of Jurists. 2007, Located at [yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf), accessed 11/01/2021

<sup>1191</sup> Accommodating Intersexuality in European Union Anti-Discrimination Law, Mitchell Travis, *European Law Journal*, Vol. 21, Issue 2, pp. 180-199, 2015

<sup>1192</sup> *In the marriage of C and D (falsely called C)* (1979) 35 FLR 340

<sup>1193</sup> Discussed on page 229

## Conclusions

Through examination of the relevant literature and the evolving laws in the chosen jurisdictions it is possible to observe a number of diverse characteristics of each jurisdictions gender recognition system. Through comparison of these systems it is possible to see a number of different options for how gender recognition systems could be developed in the future, each with advantages and disadvantages.

As discussed in the paragraphs above this thesis makes a number of recommendations for the development of gender recognition systems in the future, particularly regarding the treatment of those with intersex characteristics and / or non-binary gender identities. These recommendations are made assuming that the goal of the jurisdiction in question is to enable those within their jurisdiction to access legal gender recognition, which can be regarded as a key aspect of their human rights, with no unjust impediment.

Those recommendations in brief are:

- Legal gender recognition should be accessible with as few practical barriers as possible.
  - Features of a gender recognition system which may pose unjust barriers include:
    - Fees
    - A time-consuming bureaucratic application process
    - Evidential requirements which may not be required.
    - Medical requirements, which are particularly problematic<sup>1194</sup>
    - A lack of public knowledge about how the process functions
    - A lack of a standardised process for applications.
- Legal Gender recognition systems should be designed with an understanding that they will be applied in a wide variety of situations, where recognition is done for different reasons and has differing degrees of importance.
  - As such, allowing flexibility for the vast majority of situations, as seen in the UK law regarding situations where gender is “relevant but not essential” is recommended if it is also accompanied by legislation which allows for recognition “for all purposes” under a single set of criteria, so as to provide a level of certainty.
  - Because such systems can be somewhat complex, it is recommended that

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<sup>1194</sup> See discussion of medical requirements at page 225

jurisdictions prepare comprehensive guidance and emphasise educating the public on the law and its function in this area.

- Care should be taken to ensure that recognition for every purpose accomplishes the key objectives of gender recognition systems:
  - Gender recognition systems should enable a person's gender identity to be recognised by the law as their experienced and lived gender identity. This can be thought of as the right to be seen as one's authentic gender by the law.
  - Gender recognition system should also enable a person to render documentation of their gender indistinguishable from that of a cis person, essentially allowing their trans history to “disappear” if they so desire.
- When recognising non-binary identities, in order to fulfil the purpose of gender recognition to allow people to be recognised as their authentic genders, jurisdictions should recognise the inherent diversity of “non-binary” as a category.
  - As such it is recommended that non-binary not be treated as a “third gender” with its own gender segregated facilities, instead the appropriateness of those identifying as non-binary participating in gendered spaces and activities should be decided based on the specifics of those activities and spaces on a case by case basis.
- The construction of nongendered spaces (although not at the expense of gendered spaces which many still find necessary and useful) and the de-gendering of laws is recommended to enable the full participation of non-binary people in society on equal terms with those with binary gender identities.
  - Tasmania's gender recognition law can be regarded as a positive model for recognising the diversity of genders that exist while also catering to the needs and wishes of the intersex community.
- Intersex should not be regarded as a third gender. While some jurisdictions initially adopted this process, it appears to be being moved away from by those with the most progressive gender recognition systems.

- Intersex identity should not be assigned at birth. This recommendation is based on the guidance from intersex organisations, and the wishes of the intersex community should be treated as paramount when designing legal systems to address their needs.
- The needs of intersex people regarding gender recognition can be addressed simply by ordinary gender recognition procedures provided they are made sufficiently accessible.
- With regard to specific situations which can pose difficulties regarding gender recognition, particularly of non-binary genders the first step a jurisdiction should take is to seriously critically consider whether the current use of gender or sex is justified. Once this has been examined care should be taken to ensure that whatever the purpose of the use of gender played is satisfied in the least discriminatory way possible.
  - Regarding marriage a number of jurisdictions have eliminated the gender recognition problems posed by the models of marriage used in that jurisdiction by rendering legal relationship of marriage to be gender neutral.
    - There are varying ways of implementing gender neutrality with regards to marriage and jurisdictions should attempt to implement a model which involves as few procedural hurdles or difficulties for transgender people as possible.
- Regarding prisons jurisdictions should very seriously consider what their prisoner classification system is intended to do, and whether it is being done in the least discriminatory way possible.
  - Due to the inherent diversity in circumstances, identities and risks posed by prisoners jurisdictions should avoid creating blanket rules, such as housing based solely on birth certificates, as these are likely to result in injustice or unjustified harm in a number of individual cases. Instead an individual approach where a number of clear, predetermined factors are considered in a consistent and transparent manner that may be appealed.
  - Due to the serious safety concerns inherent in discussions regarding the

housing of prisoner's jurisdictions should consider safety to be paramount in deciding where a prisoner should be housed.

- When considering safety jurisdictions should keep in mind that the female estate ought to be equipped to deal with women who pose a danger to others as a part of its normal operation, including women convicted of sexual offences. Therefore while a transgender prisoner may have a history of sexual offences it should be considered whether it is proportionate to treat them differently to another woman.
- Jurisdictions should also consider whether the risk they seek to mitigate is social in nature, rather than biological. Differentiating transgender prisoners from cisgender prisoners who otherwise pose similar risks may not be justified.

In general jurisdictions should ensure that their gender recognition systems are based in preserving autonomy, ensuring that they systems do not contradict their essential purpose and ensure that their policies are non-discriminatory. Jurisdictions should also keep in mind that gender recognition is a developing area of law. This thesis sought to examine diverse jurisdictions to identify examples of problems encountered by gender recognition systems as well as examples of positive and progressive practice. As such it is limited by the time in which it is written. Due to the constantly changing nature of the law it is recommended that the recommendations in this document are not treated as set in stone, but rather as demonstrations of general principles which should be considered. New evidence and new models of gender recognition will continue to emerge and should be considered when they do so.

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Word count: 96575



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